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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 171

MRS. J. H. POBRESLO, APPELLANT,

vs.

JOSEPH M. BOYD COMPANY, CLARENCE E. KARN, L. D. ATKINSON, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

FILED JUNE 23, 1932

(36,868)

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IN SUPREME COURT OF THE UNITED STATES

Mrs. J. H. Pobreslo, Plaintiff and Appellant,

vs.

Joseph M. Boyd Company, Defendant, and Clarence E. Karn, L. D. Atkinson and Leo T. Crowley and Edward J. Samp, Garnishee Defendants and Respondents

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed May 31, 1932

Petition for Appeal

Considering herself aggrieved with the final decision of the Supreme Court of the State of Wisconsin in the above entitled cause, the appellant named herein as Mrs. J. H. Pobreslo hereby prays that an appeal be allowed to the Supreme Court of the United States herein and for an Order fixing the amount of bond thereon.

Assignment of Errors

And the said appellant assigns the following errors in the record and proceedings in said case:

That the Supreme Court of the State of Wisconsin erred in:

1. Holding that Chapter 334, Laws of 1897 of Wisconsin, constitutes a valid enactment and barred the plaintiff from [fol. 2] maintaining a garnishment action against the assignees, even though the assignment was otherwise void.

2. In failing to hold that Chapter 334, Laws of 1897 of Wisconsin, is not in effect an involuntary bankruptcy system with provision for discharge and was wholly suspended by the National Bankruptcy Act.

3. Holding that the State Statute such as Chapter 128, Wisconsin Statutes, which provides for the distribution of the assets of an insolvent debtor among his creditors, is not

suspended by the Bankruptcy Act, regardless of whether it contains a valid provision for discharge.

4. In failing to hold that any statutory proceedings such as contained in Chapter 128, Wisconsin Statutes, which provides for the ratable distribution of the property of insolvents among their creditors, is within the field entered by Congress when it passed the National Bankruptcy Act.

5. In failing to hold that a statutory proceeding such as Chapter 128, which provides for the ratable distribution of the property of insolvents among their creditors in a manner different from and inconsistent with the provisions of the National Bankruptcy Act, is not suspended by the National Bankruptcy Act.

6. In failing to hold that the proceedings in the State Court under Chapter 128 were tantamount to an insolvency proceedings and were, therefore, within the field occupied by Congress when it passed the National Bankruptcy Act.

7. In holding that the assignment in this case was effective to withdraw the assigned property from a non-resident creditor who was unable to invoke the Bankruptcy Act.

[fols. 3 & 4] 8. Holding generally that the several provisions of Chapter 128, Wisconsin Statutes, relating to assignments for the benefit of creditors, are separate and distinct from the provisions of said chapter relating to the discharge of insolvent debtors.

Prayer for Reversal

For which errors the appellant named herein prays that the judgment of the Supreme Court of the State — Wisconsin herein appealed from be reversed and a judgment rendered confirming the judgment of the Circuit Court for Dane County, Wisconsin.

Clifford G. Mathys, James H. Wegener, Robert M. Rieser, Counsel for Appellant. Olin and Butler, Wegener & Roick, of Counsel.

[fol. 5] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 31, 1932

The appellant in the above entitled suit having prayed for an allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Circuit Court of Dane County, Wisconsin, on January 27, 1932, and appealed to the Supreme Court of the State of Wisconsin and reversed by an opinion filed herein on the 10th day of May, 1932, and the Mandate issued pursuant thereto; and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors and prayer for reversal pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be and the same is hereby allowed in the Supreme Court of the United States from the Supreme Court of the State of Wisconsin [fols. 6-22] in the above entitled cause as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Wisconsin shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States so that he shall have the same in said Court within thirty days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of five hundred 00/100 Dollars.

Dated this 31st day of May, 1932.

Marvin B. Rosenberry, Presiding Justice of the Supreme Court of the State of Wisconsin. (Seal Supreme Court of Wisconsin.)

[fol. 23] [File endorsements omitted]

IN CIRCUIT COURT OF DANE COUNTY

Mrs. J. H. POBRESLO, Plaintiff,

vs.

GUARANTY MORTGAGE CORPORATION and THE JOSEPH M. BOYD COMPANY, Defendants; Clarence E. Karn, L. D. Atkinson, and Leo T. Crowley, Garnishee Defendants

GARNISHEE AFFIDAVIT—Filed Sept. 1, 1931

STATE OF WISCONSIN,
County of Dane, ss:

C. G. Mathys being first duly sworn, on oath says that he is one of the attorneys for the plaintiff above named and makes this affidavit on her behalf, being thereunto duly authorized; that a summons has been issued in the above entitled action; that the same is an action to recover damages founded upon express contract; that the amount of the plaintiff's claim against the above named defendant, The Joseph M. Boyd Company, is Twenty Five Hundred Dollars ($2,500), together with interest thereon at six per cent from April 10, 1931, over and above all offsets. That Clarence E. Karn, L. D. Atkinson and Leo T. Crowley are jointly indebted to and have property, real and personal, in their possession and under their control belonging to the defendant The Joseph M. Boyd Company, and that such indebtedness and property are to the best of the knowledge and belief of this affiant not by law exempt from seizure or sale upon execution.

That The Joseph M. Boyd Company is a corporation [fol. 24] organized and existing under and by virtue of the laws of the State of Wisconsin with its principal office and principal place of business in Madison, Dane County, Wisconsin; that on the 23rd day of March, 1931 the said The Joseph M. Boyd Company, being then insolvent, by an instrument in writing, purported to assign and set over all of its assets, its real and personal property of every kind and description, to Clarence E. Karn, L. D. Atkinson and Leo T. Crowley, as assignees, to distribute the said assets and property among the creditors of the said The

Joseph M. Boyd Company, in accordance with the provisions of Chapter 128, Wisconsin Statutes of 1929.

That the said assignees on March 23, 1931, took immediate possession of the said assets and property and immediately took upon themelves the execution of the trust conferred upon them by said purported assignment and that they immediately, as such assignees, and on March 23, 1931, petitioned the Circuit Court for Dane County, Wisconsin, to assume jurisdiction over the administration of the assets and property so assigned to them, and that in accordance with the prayer of the said petition, the said court on the same day assumed jurisdiction over the administration of the assets so transferred and assigned under the provisions of said Chapter 128, Wisconsin Statutes of 1929.

That the said assignment is wholly void and inoperative for the reason among others that the said assignees immediately took possession of the said property and assets, and immediately took upon themselves the execution of said trust, without procuring, furnishing or delivering any bond [fol. 25] whatsoever, as required by Section 128.06, Wisconsin Statutes; that before taking possession of the said property and taking upon themselves the execution of the said trust, under said assignment, they entirely neglected and failed to procure and to deliver to the county judge or to a court commissioner of Dane County, or to any one any bond whatsoever; that they have at no time procured, furnished or delivered over to the county judge or court commissioner or the clerk of the Circuit Court for Dane County a bond in a sum equal to the present value of the assets of said assignor; that on or about April 11, 1931, each of the said assignees filed with the Circuit Court for Dane County a separate bond in the penal sum of Ten Thousand Dollars ($10,000); that the value of the assets of said assignor on March 23, 1931, and at all times thereafter was and has been vastly in excess of Thirty Thousand Dollars ($30,000), that the said bonds in the sum of Ten Thousand Dollars ($10,000) were at no time delivered to a county judge or court commissioner; that in connection with the execution and delivery of said bonds the value of the assets of The Joseph M. Boyd Company was at no time ascertained by the oath of witnesses and of the assignor, as required by Section 128.06, Wisconsin Statutes.

That the said assignment is void for the further reason that neither the said assignment nor a full and true copy thereof was at any time delivered to the county judge or a court commissioner, nor did the assignees in the presence of a county judge or court commissioner, before delivering a copy of the said assignment to the county judge or a court commissioner, endorse in writing on such assignment, or a [fol. 26] copy thereof, their consent to take upon themselves the faithful discharge of the various duties specified in said assignment, nor did they at any time endorse in writing on said assignment, or a copy thereof, their consent to take upon themselves the faithful discharge of the various trusts specified in said assignment; nor did a county judge or court commissioner endorse upon said assignment, or a copy thereof, that said assignees did, in his presence, endorse in writing their consent to so take upon themselves the faithful discharge of the various trusts specified in said assignment, all as required by Section 128.12, Wisconsin Statutes, 1929.

Upon information and belief affiant states that said assignees did not within twenty days after the execution of said assignment, make and file in the office of the Clerk of the Circuit Court for Dane County, Wisconsin, an inventory of the assets and a list of the creditors of said The Joseph M. Boyd Company, as required by Section 128.13, Wisconsin Statutes, and states further, upon information and belief that up to the present time no inventory has been filed, as required by said Section 128.13, Wisconsin Statutes, 1929.

That the said purported assignment is void for the further reason that the said court and the said trustees were wholly without power or jurisdiction to administer the assets of the said insolvent or to discharge it from its obligations, as prescribed by said Chapter 128, Wisconsin Statutes, 1929, such jurisdiction being in conflict with the provisions of the Bankruptcy Act (11 U. S. C. A.), which is by virtue of its enactment under the power vested in Congress by Article 1, Section 8, Clause 4, United States Constitution, supreme in all matters relating to the distribution of insolvent assets and the discharge of insolvent debtors. That [fol. 27] the said Bankruptcy Act supersedes all state laws dealing with the matter of the distribution of insolvent

assets, and with all state laws in conflict therewith, and vests in the Federal courts of Bankruptcy exclusive jurisdiction to administer the distribution of insolvent estate-, and to discharge insolvent debtors from their obligations.

That the said insolvent estate is now being administered and its assets are being distributed by the said trustees under the direction of the court, in accordance with the provisions of said Chapter 128, Wisconsin Statutes, 1929, and will continue to be so distributed. That the said Chapter 128, Wisconsin Statutes, 1929, besides providing for the discharge of insolvent debtors, among other things, classifies creditors in a manner materially different from the classification prescribed by the Bankruptcy Act, and prescribes the order for the payment of claims in a manner different and contrary to the provisions of the Bankruptcy Act, and creates preferences in favor of those creditors who file their claims within three months subsequent to the publishing of notice for filing of such claims, contrary to the provisions of the Bankruptcy Act. That the said differences between Chapter 128, Wisconsin Statutes, 1929, and the Bankruptcy Act are such as to cause a distribution under the said Chapter 128, Wisconsin Statutes, 1929, which is less favorable to general creditors, of plaintiff's standing, than the distribution provided for by the Federal Bankruptcy Act.

That the claim of the plaintiff against the said The [fol. 28] Joseph M. Boyd Company exceeds in amount Five Hundred Dollars ($500) over and above the value of any securities held by her, and that said claim is a provable claim within the intent and meaning of the Bankruptcy Act, but that the plaintiff is unable to invoke the jurisdiction of a Federal Court of Bankruptcy for the reason that the creditors of the said The Joseph M. Boyd Company, exclusive of its employes, are more than twelve in number. That diligent effort has been made to secure the joinder of a sufficient number of creditors of the said The Joseph M. Boyd Company with plaintiff in invoking the jurisdiction of the Federal Court of Bankruptcy, but plaintiff was unable to secure the joinder of other creditors to that end.

That the plaintiff has not filed a claim in the present proceedings pending in the Circuit Court for Dane County, Wisconsin, pursuant to Chapter 128, Wisconsin Statutes of

1929, and under the order of the court entered in that proceeding, preference will be given to creditors who have filed claims therein and the plaintiff will be debarred a dividend. That plaintiff is in all respects qualified to invoke, and would have invoked, jurisdiction of the Bankruptcy court, had she been able to secure the co-operation of a sufficient number of qualified creditors to that end.

That this affidavit is made by affiant on behalf of the plaintiff for the reason that the plaintiff is at present without Dane County, wherein affiant resides. That affiant's knowledge and information in respect to the matters herein set forth is based upon examination of the court records in the Circuit Court for Dane County in the matter of the [fol. 29] Assignment of The Joseph M. Boyd Company, and upon his personal investigation of the facts herein set forth.

C. G. Mathys.

Subscribed and sworn to before me this 29th day of July, 1931. Byron H. Stebbins, Notary Public, Dane County, Wisconsin. My commission expires April 2, 1934. (Notarial Seal.)

[fol. 30] [File endorsements omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

AFFIDAVIT AND ANSWER IN GARNISHMENT—Filed Jan. 16, 1932

STATE OF WISCONSIN,
County of Dane, ss:

Edward J. Samp, being first duly sworn, on oath deposes and says that a garnishee summons in the above entitled action together with an affidavit in garnishment was served on the garnishee defendants on or about July 30, 1931, and that this answer is made by this affiant because of the reasons more fully set forth herein. That Leo T. Crowley, Clarence E. Karn and L. D. Atkinson or this affiant was then and is now in no manner and upon no account whatever indebted to the defendant, The Joseph M. Boyd Com-

pany, unless an indebtedness exists under the following facts and circumstances, to wit:

That The Joseph M. Boyd Company was and is a Wisconsin corporation organized and existing under and by virtue of the laws of the said State of Wisconsin, with its principal office or place of business in Madison, Wisconsin; that the said corporation was engaged in the business of selling securities, loans and other investments to the public and of lending money, and that the said The Joseph M. Boyd Company did on March 23, 1931, by an instrument, a copy of which is hereto attached and marked Exhibit A, assign, transfer and set over all its real and personal prop- [fol. 31] erty to Leo T. Crowley, Clarence E. Karn and L. D. Atkinson as assignees or trustees to dis*pute* the same amongst the creditors of The Joseph M. Boyd Company. That immediately following this assignment the said assignees took possession of the property and assets of the said corporation or some of them, and proceeded to the execution of the trust conferred upon them, and petitioned the Circuit Court for Dane County to assume jurisdiction over the administration of the assets and the property conveyed to them, and that the said Circuit Court for Dane County, Wisconsin, did assume jurisdiction over the administration of the assets and property so conveyed to the said assignees or trustees in trust.

That no bond was given by the said assignees before they received possession of the said property, and that no bond was given to the Clerk of the Circuit Court for Dane County, Wisconsin, in a sum equal to the value of the said assets, but that each of the assignees or trustees pursuant to an order of court duly made, did execute and deliver a separate and independent bond in the amount of ten thousand dollars ($10,000) each, and that the said bond in the amount stated also executed and delivered to the said Clerk of the Circuit Court for Dane County, Wisconsin, pursuant to an order of the said Circuit Court for Dane County entered on April 11, 1931, which said order expressly set out the amount of the said bond. That at the time the bond was so designated as to amount, there was no appraisal under oath by witnesses or of the assignor, the amount designated in said bond being set upon the petition of the said assignees.

That this affiant denies that the assignment is void for the reasons set forth in the affidavit of garnishment or for any other reason, but admits that while neither the assignment nor a copy thereof was delivered to the County Judge or Court Commissioner alleges the fact to be that the original assignment with the consent of the said assignees [fol. 32] to the assumption of the *the* trust was exhibited to one of the Judges of the Circuit Court for Dane County, Wisconsin, and was and has been since the 23rd day of March, 1931, filed in the office of the Clerk of the Circuit Court for Dane County, Wisconsin. That no inventory of the assets of the said The Joseph M. Boyd Company were made and filed in the office of the Clerk of the Circuit Court for Dane County, Wisconsin, within twenty (20) days after the making of said assignment because of the character of the assets and the number and items of the same it was not possible so to do, but that on March 23, 1931, by order of the Circuit Court the said assignees were directed to file with the Circuit Court for Dane County within thirty (30) days an inventory of the assets of the said The Joseph M. Boyd Company, and that thereafter there was filed in the Circuit Court for Dane County, Wisconsin, an order of the Circuit Court directing the said trustees to file such an inventory and a report on or before June 1, 1931, which was done, the said report consisting of a list of all the assets of the corporation and including a certified audit of the affairs of the corporation made by public accountants or auditors, but that the said Circuit Court for Dane County did by an order duly entered relieve the trustees from the necessity of making public the appraisals on items of real estate on the ground that to do so might hinder the sale of the said properties at prices in excess of the appraisal value.

That said certified public accountant's report contained a list in detail of all creditors of the said The Joseph M. Boyd Company. That said assignment is not void for the reason set forth in said affidavit and garnishment or for any other reason, and that Chapter 128 of the Wisconsin Statutes is not in contravention or derogation of the National Bankruptcy Act, and that on the contrary the said accounts of The Joseph M. Boyd Company were valid and constituted a conveyance in trust in the nature of a common law [fol. 33] assignment for the benefit of creditors of The Joseph M. Boyd Company, and that the Circuit Court for Dane

County in assuming administration over the said trust was wholly and entirely within its jurisdiction both under the provisions of Chapter 128 of the Wisconsin Statutes, and under its inherent powers of a court of equity in administering a common law trust for the benefit of creditors.

That the said Leo T. Crowley, Clarence E. Karn and L. D. Atkinson duly resigned said trust in writing, and that on or about the 4th day of December, A. D. 1931, the directors of The Joseph M. Boyd Company by an instrument in writing amended the former grant of conveyance for the assignment for the benefit of creditors, a copy of the resolution of the said Board of Directors and of the instrument supplementary and amendatory of the original assignment is hereto attached as Exhibit B.

That on or about the 10th day of December, A. D. 1931, the Circuit Court for Dane County, Wisconsin, by an order duly entered accepted the resignation of the said trustees and appointed this affiant, Edward J. Samp, as the sole trustee for the administration of the said trust which is being presently administered by this affiant under and by virtue of the appointment aforesaid.

That this affiant is possessed of the assets and property of the said The Joseph M. Boyd Company which were conveyed to the said Leo T. Crowley, Clarence E. Karn and L. D. Atkinson, Trustees since resigned, and makes this affidavit on behalf of himself as said trustee and on behalf of his predecessors in trust, namely, Leo T. Crowley, Clarence E. Karn and L. D. Atkinson, and is authorized so to do.

That except as herein set forth, neither Leo T. Crowley, Clarence E. Karn or L. D. Atkinson, nor this affiant had at the time of the service of said garnishment summons, [fol. 34] or now have in their or his possession or under their or his control, any real estate or personal property, effects or credits of any description belonging to the said The Joseph M. Boyd Company, or in which it has any interest.

Edward J. Samp.

Subscribed and sworn to before me this 16th day of December, A. D. 1931. Dora Wepking, Notary Public, Dane County, Wisconsin. (Seal.)

[fol. 35] Filed Feb. 20, 1932. Arthur A. McLeod, Clerk of Supreme Court, Madison, Wis.

EXHIBIT "A" TO AFFIDAVIT AND ANSWER

STATE OF WISCONSIN:

CIRCUIT COURT, DANE COUNTY

In the Matter of the Voluntary Assignment for the Benefit of Creditors of THE JOSEPH M. BOYD COMPANY

Petition

To the said Court:

Your petitioners, Leo T. Crowley, C. E. Karn and L. D. Atkinson, respectfully represent and show to the court:

That your petitioners were on the 23rd day of March, A. D. 1931, named as assignees or trustees under a voluntary assignment made by The Joseph M. Boyd Company of Madison, Wisconsin, a Wisconsin corporation located in the City of Madison, Dane County, Wisconsin, and engaged in carrying on a general investment and mortgage loan business; that one of the originals of the said assignment is herewith presented to the court and filed herein; that the said assignees, hereinafter referred to as "trustees", have commenced the administration of the said trust to the best of their ability, and in accordance with its terms; that your petitioners desire to send out a notice to all creditors and claimants against the said The Joseph M. Boyd Company notifying them to file claims; that your petitioners request that the Circuit Court for Dane County assume jurisdiction and supervision of the said trust and the administration thereof to the end that a fair and lawful distribution of the assets of the said corporation may be made amongst all creditors in accordance with the respective rights which said creditors may have against said assets.

That it appears to your petitioners that an immediate appraisal should be had of the assets of The Joseph M. Boyd Company in that it is represented to your petitioners that a large fraction of the assets of the corporation consists of real estate or investments secured by real es-

tate, and it is highly desirable that an effort be made to convert said real estate into cash as speedily as possible, in order to save or eliminate carrying charges, and your [fol. 36] petitioners therefore request that this court appoint disinterested persons having a knowledge of real estate in the City of Madison and Dane County wherein it is represented the greatest portion of the real estate is situated.

And it is further represented to your petitioners that the assets of The Joseph M. Boyd Company aside from open accounts or moneys due it for advances made for or on behalf of its respective clients, consist of equities in real estate, which said real estate, however, is held in the name of the Guaranty Holding Corporation, a corporation the entire common capital stock of which is owned by The Joseph M. Boyd Company, and that likewise The Joseph M. Boyd Company as the owner of all of the outstanding common stock of the Guaranty Mortgage Company caused mortgages taken by it to be used as the basis of debentures issued and outstanding, and that the equities over and above the amounts necessary to pay the outstanding mortgages constitute assets to the Credit of The Joseph M. Boyd Company, and that it is necessary in order for your petitioners to truly understand the affairs of The Joseph M. Boyd Company to cause an audit to be made of the affairs of the said corporation, which said audit should include audits of affiliated or subsidiary corporations of The Joseph M. Boyd Company, and any personal trusteeships or other accounts which may be necessary to completely show the affairs of The Joseph M. Boyd Company.

Wherefore your petitioners pray that the court above named take full jurisdiction and supervision of the trust and the administration thereof, and the distribution of assets amongst creditors according to their just rights and equities, and make such orders as may be lawful and proper to insure the execution of the said trust, and due allowance of all proper expenses of administration and the distribution of the assets amongst the creditors according to their just and lawful rights, and ask the court if it deems it proper now or at any time hereafter to appoint either a bank receiver or trustee to take charge of the administration or distribution; and that the court likewise appoint appraisals of [fol. 37] the assets of the corporation and authorize your pe-

titioners to employ certified public accountants to make a complete audit of its financial affairs.

Dated at Madison, Wisconsin, this 23rd day of March, A. D. 1931.

Leo T. Crowley, L. D. Atkinson.

STATE OF WISCONSIN,
County of Dane, ss:

Leo T. Crowley and L. D. Atkinson, being each duly sworn, for himself states that he has read the above and foregoing petition and knows the contents thereof; that the same is true to his knowledge except as to matters therein stated on information and belief and as to them he believes it to be true; that this verification is made on behalf of himself and his respective co-trustees or assignees with whom he is identified in interest.

Leo T. Crowley, L. D. Atkinson.

Subscribed and sworn to before me this 23rd day of March, A. D. 1931. William H. Spohn, Notary Public, Dane County, Wisconsin.

On reading and filing the above and foregoing petition and voluntary assignment for benefit of creditors herein referred to,

It is ordered that this court does hereby pursuant to law, and particularly under and pursuant to the provisions of Chapter 128 of the Statutes of the State of Wisconsin, take and assume jurisdiction and supervision over the administration of the assets and property of and in possession of The Joseph M. Boyd Company at the date of said assignment for the benefit of creditors made on March 23, 1931, and of any property that may have come into possession of the said assignees named in said assignment and the distribution of said assets amongst the creditors and claimants [fol. 38] against The Joseph M. Boyd Company according to their just and lawful rights.

It is further ordered that said assignees file with this court within thirty days, unless this time be previously extended in advance of its expiration, a full inventory of all property and assets which have come into the hands of the said trustees, and of such disbursements as they have made to that time.

It is further ordered than an appraisal be had in connection with such inventory of the assets of the said The Joseph M. Boyd Company coming into the hands of the assignees, and that in connection with said appraisal Henry Bush, Harry Haley and Alex Uehling, all of Madison, Wisconsin, and they are hereby appointed and designated as appraisers of the said assets with compensation for the said appraisers to be determined by the court hereafter.

It is further ordered that the assignees cause an audit to be made of the financial affairs of the corporation by some duly certified public accountant or accountants, and a copy of said report when completed to be filed in this court. The auditors or accountants chosen by the assignees shall make audits or examinations of such affiliated or subsidiary corporations as may be necessary to disclose the affairs of The Joseph M. Boyd Company, or the value of any securities which it may list among its assets and which have been issued by affiliated or subsidiary companies; and the assignees are hereby authorized to cause the said examination to extend to and include an audit of any corporate trusteeship or personal trust administered in connection with the affairs of The Joseph M. Boyd Company.

It is further ordered that the said assignees with all convenient speed mail out and publish notice to creditors of the said The Joseph M. Boyd Company as provided in Section 128.14 of the Wisconsin Statutes of 1929, and thereafter file proof thereof in this court as prescribed in Section 128.15 of the Wisconsin Statutes.

[fol. 39] It is further ordered that said assignees continue in the administration of said trust under said instrument until the further order of this court.

Dated March 23, 1931.

By the Court:

August C. Hoppmann, Circuit Judge.

Know all men by these presents that Joseph M. Boyd Company, a Wisconsin corporation located at Madison, Dane County, Wisconsin, pursuant to a resolution of its stockholders and a resolution of its directors has, and by these presents, does assign, set over, transfer and convey to C. E. Karn, Leo T. Crowley and L. D. Atkinson of the City of Madison, Dane County, Wisconsin, all its assets of

every kind, nature and description, wherever the same may be found or located, in trust, nevertheless, to receive, handle, manage the same, and convert them into cash to the end that the just and lawful debts and demands of this corporation may be paid and discharged, and the balance of assets after the payment of the costs of administration be returned to the stockholders of this corporation in accordance with the rights of said stockholders.

This assignment is made under the following terms and conditions:

1. The said assignees may fill vacancies in their number caused by death, inability to act or resignation of any assignee, and the trusts herein created shall not fail because of the inability of any trustee to proceed further herewith.

2. The reasonable expenses of administration, including reasonable compensation to the trustees and to counsel shall be first paid, and the assets then used to pay the claims and demands of creditors in the order of their priorities.

3. The assignees and trustees may submit themselves at any time to the supervision of the proper Circuit Court for Dane County, Wisconsin, and the corporation hereby engages to execute such other or further papers as may be [fol. 40] necessary or advisable to cause or effectuate a complete perfected assignment for the benefit of its creditors, and to execute and deliver such inventories, schedules, list of creditors or other information as may be requested at any time.

4. This assignment shall take effect immediately upon the assignees or trustees evidencing their acceptance thereof, and from that date the operation of the business on the part of the corporation will be suspended.

5. In and about the execution of this trust the trustees, or the majority of them, shall be entitled to incur expenses to operate the said business, if in their judgment further operation is desirable, and there is hereby conferred upon said assignees or trustees all the rights, powers and privileges that the corporation had or might exercise, had this assignment not been executed.

Done at Madison, Wisconsin, this 23rd day of March, A. D. 1931, by the officers of the corporation duly authorized to sign the corporate name and affix the official seal by appropriate resolutions of its stockholders and directors this day given.

The Joseph M. Boyd Company, by Joseph M. Boyd, President.

Attest: R. H. Farness, Assistant Secretary.
In Presence of: William H. Spohn, Frank A. Ross.

STATE OF WISCONSIN,
County of Dane, ss:

Personally came before me this 23rd day of March, A. D. 1931, Joseph M. Boyd, President, and R. H. Farness, Asst. Secretary of the above named corporation, to me known to be the persons who executed the foregoing instrument, and to me known to be such President and Secretary of said corporation, and acknowledged that they executed the fore- [fol. 41] going instrument as such officers as the deed of said corporation by its authority.

William H. Spohn, Notary Public, Dane County, Wisconsin. My commission expires June 18, 1933.

The undersigned each individually accepts the foregoing assignment and the trusts therein created.
Dated March 23, 1931.

Leo T. Crowley, L. D. Atkinson, Clarence E. Karn. (Seal.)

[fol. 42] THE STATE OF WISCONSIN:

IN CIRCUIT COURT FOR DANE COUNTY

DANE COUNTY, ss:

I, Mary Grane, Clerk of the Circuit Court in and for the County of Dane and State of Wisconsin, do hereby certify that I have carefully compared the foregoing and annexed copy of Petition, Order, and Assignment with the original now on file and of record in my office in the Matter of the Voluntary Assignment for the Benefit of Creditors of The

Joseph M. Boyd Company, and that the same is a true and correct copy of said original, and the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the Seal of said Court, at the City of Madison, in said County, this — day of ——, A. D. 19—.

—— ——, Clerk.

[Endorsed:] State of Wisconsin, Circuit Court, Dane County. In the Matter of the Voluntary Assignment for the Benefit of Creditors of The Joseph M. Boyd Company. Certified copy of petition, order and assignment.

[fol. 43] [File endorsement omitted]

EXHIBIT "B" TO AFFIDAVIT AND ANSWER

Whereas, under date of March 23, 1931, The Joseph M. Boyd Company executed and delivered a certain assignment for the benefit of its creditors, and the said assignment did provide amongst other things as follows:

"The assignees and trustees may submit themselves at any time to the supervision of the proper Circuit Court for Dane County, Wisconsin, and the corporation hereby engages to execute such other or further papers as may be necessary or advisable to cause or effectuate a complete perfected assignment for the benefit of its creditors, and to execute and deliver such inventories, schedules, list of creditors or other information as may be requested at any time."

and

Whereas, subsequent thereto and on the said 23rd day of March, 1931, the Circuit Court for Dane County did assume and take jurisdiction and supervision over the administration and affairs of the said The Joseph M. Boyd Company; and

Whereas, subsequent thereto and on proceedings held in the Circuit Court for Dane County, said court did enter an order or decree holding that the said assignment was a common law assignment, and intended by the said assignor as such; and

Whereas, the original assignment dated March 23, 1931, did not provide in detail for the administration of said trust, and it is on advice of counsel deemed advisable to execute a supplementary instrument for the purpose of carrying into effect the purpose of said original assignment to the end that the interests of all parties be fully protected, and that the administration of the trust may be expedited;

Now, therefore, be it resolved, That the Board of Directors of The Joseph M. Boyd Company do hereby authorize and direct the officers of The Joseph M. Boyd Company, to wit, its president and secretary, to execute that supplemental instrument, a copy of which is annexed hereto and marked Exhibit A, the same to relate back and be effective [fol. 44] as of the date of the original assignment, to wit, March 23, 1931, with the same force and effect as if it had then been adopted, and do further ratify all acts of the assignees in requesting the Circuit Court for Dane County to take supervision and direction over the administration of the trust created by the said assignment dated March 23, 1931.

[fol. 45] [File endorsement omitted]

EXHIBIT "A" TO EXHIBIT "B"

Know all men by these presents that that certain instrument of trust executed by The Joseph M. Boyd Company on March 23, 1931, be and the same is hereby modified and amended in the following respects:

1. Paragraph 1 of said assignment is modified so as to read:

"In case of the resignation of any or all trustees, or by reason of their disqualification or inability to act, or in case any vacancy shall occur, the said vacancy, however caused, shall be filled by the Judge of the Circuit Court for Dane County who may appoint a successor or successors of said Trustees, and may in his judgment appoint a single trustee or more than one trustee, as he shall determine, to the end that the trusts herein created shall not fail because of the inability of any or all trustees to proceed herewith."

2. That paragraph designated 3 is modified by adding to it the following paragraph:

"This assignment shall be deemed a common law assignment creating an express trust for the uses and purposes stated herein, and the Circuit Court for Dane County, Wisconsin, be and it is hereby requested to take supervision of and jurisdiction over the administration of said trust."

3. And the said instrument is also modified and amended by the addition of the following paragraph:

"The said The Joseph M. Boyd Company engages, covenants and agrees to execute all documents which may be necessary or proper to vest in the Trustees herein named or their successor or successors in title any and all assets and/or property of The Joseph M. Boyd Company of whatever kind or nature and wherever located, and the said The Joseph M. Boyd Company does by these presents confirm in all respects the grant and conveyance made to the said trustees on March 23, 1931, and does for further assurance hereby again grant and convey unto the said trustees or successor or successors, and does hereby deliver to him or them all property, real and personal and/or mixed, now owned by The Joseph M. Boyd Company, or in which it has any right, claim, title or interest including all choses in action, book accounts, bills receivable, credits or effects, to which it is beneficially entitled, whether in possession, reversion, remainder or expectancy."

To have and to hold the same unto the said trustees and to their successor or successors or assigns upon the trusts and subject to the provisions and agreements hereinafter declared concerning the same.

[fol. 46] It is hereby declared that the said trustees shall stand possessed of the property, assets, hereditaments, and premises hereinbefore conveyed upon trust and subject to the following terms and conditions:

(a) Said property, choses in action, claims, demands and other assets so assigned as hereinbefore provided shall be converted into money by the trustees or such person or persons as they shall appoint for that purpose, and in such manner and at such time and upon such terms as in the judgment of the said trustees shall be for the best interests

of the parties concerned, and said trustees are hereby authorized, if they deem it advisable so to do, to conduct and continue the business heretofore operated or conducted by The Joseph M. Boyd Company, or any portion thereof, and may hire such help as they deem necessary and pay the same, and incur and pay necessary current expenses in carrying on said business from the receipts of the business and the property.

And the said trustees are hereby authorized to borrow, if they shall deem it necessary for the continuance of said business and authorized to execute and deliver notes, mortgages and/or other proper instruments of conveyance for the security of said loan or loans; and said trustees are authorized specifically to do all things necessary, or which they may deem necessary and/or advisable to be done in carrying on or closing out said business and property as in their judgment may be for the best interests of all parties concerned.

(b) Said trustees shall dispose of and/or collect all of the assets, furniture, fixtures, accounts, securities, claims, choses in action and/or all other property covered by this trust, in such manner and at such times as may to them seem most expedient, and for the best interests of all parties concerned, distributing the net proceeds after the payment [fol. 47] of the necessary expenses of operation and liquidation, as follows, to-wit:

I. Pay all claims, which are by law entitled to be paid in full in priority to other debts as provided in the Acts of Congress relating to bankruptcy and in the order of priority as therein provided.

II. Pay all costs, charges and expenses of and/or incidental to the negotiation, preparation and execution of these presents and carrying the same into effect.

III. Pay, divide and distribute the residue of the said moneys ratably unto and among the creditors of The Joseph M. Boyd Company who may — unsecured without preference, and/or other secured creditors of the debtor after the deduction from the amount of their said claims of the value of their securities; and/or in the event of the secured creditor or creditors surrendering to the trustee any and all securities which they may have, then such

creditors to share ratably with other unsecured creditors; distribution and/or payment to be made upon such installment and at such times as the trustees shall deem proper, and to pay the surplus, if any, to The Joseph M. Boyd Company. Said creditors shall be entitled to receive dividends under these presents in respect of all debts due to them respectively which would have been provable under the National Bankruptcy Act, and on the amounts for which they would have been so provable.

(c) It is hereby declared that notwithstanding the said trust for the sale or distribution of assets herein contained, it shall be lawful for the trustee to postpone the sale and collection of any part of the said property for such time as is consistent with reducing the same to money until the same can be wisely and prudently done. And in the meantime and until the said property and assets hereinbefore conveyed shall have been called in, collected, sold and converted into money, it shall be lawful for their trustees at [fol. 48] their discretion to insure against damage by fire or otherwise at the cost of the trust estate.

(d) For more effectually enabling the said trustees, their successors or assigns, to recover and receive all or any part of the assets, estate, debts, operations, choses in action, claims or effects hereby conveyed, assigned and/or transferred, The Joseph M. Boyd Company has made and appointed and by these presents does make, constitute and appoint the Trustees, their successors or successor or assigns, its attorney-in-fact, and authorize him or them to do all things necessary in conducting said trusteeship, and in fulfilling the conditions of this agreement in its name or in their or his name; to commence, continue, discontinue, compromise, settle, and/or bring suit, perfect and carry out actions or suits against any person or persons or corporations for or on account of any and/or all said estate, property, debt, choses in action or effects.

(e) All of the claims or debts owing by The Joseph M. Boyd Company to the said creditors shall be based upon and allowed in the first instance by the trustees both as to amount, priority and payment, and in allowing and passing upon claims the provisions of the Act of Congress relating to bankruptcy and the decisions thereunder shall govern

with the same force and effect as if the said The Joseph M. Boyd Company had been adjudicated bankrupt as of the date of the original assignment.

(f) The trustees or their successor, successors or assigns, may execute any of the trust or powers hereof or perform any duties required by this instrument by or through their or his attorneys, agents, receivers or employes, and shall be entitled to advice of counsel concerning all matters of trust hereof, his or their duties hereunder, and shall not be liable for any action taken by them or him in good faith and believed to be within the discretion or power conferred [fol. 49] by this indenture. The trustee shall be authorized to pay such reasonable compensation as they may deem proper to such agent or employes as they may reasonably employ in connection with the trust hereof. The trustees shall not be liable for the consequences of any oversight or error in judgment, and shall be answerable only for their own acts, receipts and defaults, and not for those of any person employed by them, and selected with reasonable care, nor for any loss unless the same happens through their own wilful default.

(g) All and every grant, covenant, agreement and condition herein contained shall extend to and be for the benefit and bind the trustees herein mentioned, and their successors or successor in trust. The word "trustees" when used herein to include the trustees herein named, their successor or successors in trust.

And the original assignment of March 23, 1931, is hereby specifically ratified and confirmed with the modifications and amendments herein set forth, to all intents and purposes as though said modifications were originally written into, and constituted a part of said original assignment.

In witness whereof the Joseph M. Boyd Company has caused these presents to be signed by its proper officers pursuant to a resolution duly adopted by its Board of Directors, to wit, the President and secretary, and has caused to be affixed hereto its corporate seal, this 3 day of December, A. D. 1931.

The Joseph M. Boyd Company, by Joseph M. Boyd, President.

Attest: R. R. Kropf, Secretary. (Seal.)

In Presence of William H. Spohn, Edward J. Samp.

[fol. 50] STATE OF WISCONSIN,
County of Dane, ss:

Personally came before me this 3 day of December, A. D. 1931, Joseph M. Boyd, President and R. R. Kropf, Secretary of the above named corporation, to me known to be the persons who executed the foregoing instrument and to me known to be such President and Secretary of said corporation, and acknowledged that they executed the foregoing instrument as such officers as the deed of said corporation by its authority.

Stella E. Byrne, Notary Public, Dane County, Wisconsin. My commission expires July 16, 1933. (Notarial Seal.)

[fol. 51] Due and personal service of the within admitted this 1-th day of December, 1931.

Olin & Butler, Attorney- for Plaintiff.

[File endorsements omitted.]

[fol. 52] IN CIRCUIT COURT OF DANE COUNTY

FRANK J. HESS, Plaintiff,

vs.

JOSEPH M. BOYD COMPANY, Defendant, and CLARENCE E. KARN, L. D. Atkinson, and Leo T. Crowley, Garnishee Defendants

Mrs. J. H. POBRESLO, Plaintiff,

vs.

JOSEPH M. BOYD COMPANY, Defendant, and CLARENCE E. KARN, L. D. Atkinson, and Leo T. Crowley, Garnishee Defendants

FRED KLEIN, SR., Plaintiff,

vs.

JOSEPH M. BOYD COMPANY, Defendant, and CLARENCE E. KARN, L. D. Atkinson, and Leo T. Crowley, Garnishee Defendants

MEMORANDUM OPINION—Filed Jan. 16, 1932

[File endorsements omitted.]

[fol. 53] The Joseph M. Boyd Company is a Wisconsin corporation with its principal offices and place of business in Madison, Wisconsin. It is engaged in the business of selling securities, loans and investments to the public. On March 23d, 1931, it made a voluntary assignment of all its property to Leo T. Crowley, Clarence E. Karn and L. D. Atkinson as assignees, the said assignees took possession of the property and assets of the company and proceeded to the execution of the trust conferred upon them, or attempted to be conferred upon them by the assignment, and petitioned the Circuit Court of Dane County to assume jurisdiction over the assets and property conveyed to them.

On this petition, the Circuit Court of Dane County, on the same date, did assume jurisdiction over the assets and made an order to that effect. It is conceded that no bond was given by the assignees before they received possession of the property and that no bond was ever given to the Clerk of the Circuit Court of Dane County in a sum equal to the value of said assets. However, each of the assignees or trustees, in pursuance of the order of the court, executed a separate and independent bond in the amount of $10,000 each, the date of such order being April 11, 1931.

[fol. 54] There was no appraisal under oath by witnesses or the assignees of the amount of the assets. There was no inventory of the assets made or filed in the office of the Clerk of Circuit Court of Dane County, Wisconsin, within twenty days after making said assignment, but an inventory was filed some time before June 1931. On the 4th day of December, 1931, the said Leo T. Crowley, Clarence E. Karn and L. D. Atkinson resigned said trust in writing and an amendment was made to the original instrument of assignment and on the 10th day of December, 1931, the Circuit Court of Dane County, entered an order accepting the resignation of said trustees and appointed Edward J. Samp as the sole trustee for the administration of such trust.

On July 30, 1931, the plaintiff, Frank J. Hess, began an action of garnishment against the Boyd Company as de-

fendant and said Karn, Atkinson and Crowley garnishees, alleging among other things that a summons had been issued in the original action and that the original action against the Boyd Company was an action to recover damages founded upon contract, in the sum of $6,227.70 with interest thereon, and alleging that the said Karn, Atkinson and Crowley were jointly indebted to and had real and personal property in their possession and under their control belonging to the defendant Boyd Company.

The garnishee defendant, who is now Edward J. Samp, as trustee, answered the garnishment proceedings by an admission of the facts heretofore stated and denied specifically that they, Crowley, Karn and Atkinson, nor the present answering garnishee Samp, had at the time of the service of the garnishee summons or now have in their or his possession or under their or his control, any real estate or personal property, effect or credit of any description belonging to the said Joseph M. Boyd Company, or in which it has any interest. The matter now comes before the court upon motion of the plaintiff for judgment upon [fol. 55] the pleadings.

The issue in this case, broadly stated, is: Did the act of assignment of the Joseph M. Boyd Company pass title to its real and personal property to the trustees, on the theory that it was an assignment under the provisions of Chapter 128 of the Wisconsin Statutes, or a common law assignment lawfully made. It is contended on the part of the plaintiff that the property now in the hands of the trustee is in fact still the property of Joseph M. Boyd Company and subject to garnishment for the reason that the act of assignment under which the garnishee defendant now claims title, was an invasion of the field of the national bankruptcy act and void as to this plaintiff.

The original assignment under which the trustee now claims to hold title, among other things, recites that it is made pursuant to a resolution of the Boyd Company stockholders and a resolution of its directors and assigns, sets over and transfers and conveys to the said Karn, Crowley and Atkinson:

"All its assets of every kind, nature and description, wherever the same may be found or located, in trust nevertheless to receive, handle, manage the same, and convert them into cash, to the end that the just and lawful debts

and demands of said corporation *may be paid and discharged* and the balance of the assets after the payment of the costs of administration be returned to the stockholders of this corporation in accordance with the rights of said stockholders";

and further:

"The reasonable expenses of administration, including a reasonable compensation to the trustees and to counsel, shall be first paid and the assets then used to pay the claims and demands of creditors *in the order of their priorities.*"

The order of the court made pursuant to a petition setting forth the foregoing assignment, among other things, recites as follows:

[fol. 56] "It is ordered that this court does hereby, pursuant to law *and particularly under and pursuant to the provisions of Chapter* 128 *of the Statutes of the State of Wisconsin,* take and assume jurisdiction and supervision over the administration of the assets of the property of and in possession of the Joseph M. Boyd Company at the date of said assignment for the benefit of creditors, made on March 23d, 1931, and of any property that may have come into the possession of said assignees named in said assignment *and the distribution of such assets* among the creditors and claimants against the Joseph M. Boyd Company, according to their just and lawful rights."

So it is quite evident that at the time of the assignment, the petitioners intended to and the court assumed to proceed under the provisions of Chapter 128 of the Statutes of the State of Wisconsin. It is now freely conceded and our Supreme Court has held that in so far as this section provides for a discharge of the debtor, it is entirely superseded by the national bankruptcy act.

In re Tarnowski, 191 Wis. 279.
Hazelwood vs. Olinger Building Department Stores (Wis.), 236 N. W. 591.

But, it is suggested now that even though the assignment was attempted under the direct provisions of Chapter 128, which concededly was not complied with as to the giving of

a bond and in other particulars, and which may also be void as invading the field of the national bankruptcy act, still the assignment is valid as a common law assignment and as such is protected against attachment or garnishment under certain provisions of this same chapter of our law, which the Supreme Court has held valid and as in fact a separate and distinct chapter from the discharge feature of our general assignment law.

Attention is particularly called to the case of International Shoe Company vs. Pinkus, 278 U. S. 261. I submit that as applied to the instant case, the line of reasoning now adopted by the garnishee defendant to meet the emergency as presented in the Pinkus case, is too subtle to be understandable. My position in this matter is not out of harmony with any of the decisions of our own court. It is nowhere held in any of them that an assignment under [fol. 57] the common law or under Chapter 128, which in terms or effect results in an impounding of the debtor's property and a discharge of the debtor company, can be held valid under the decision of the Pinkus case or any other Federal decision.

What I am here holding is in no sense a denial of the common law right inherent in the ownership of property, as indicated in the opinion of Mr. Justice Owen in the Tarnowski case above cited. Conceded that the assignment in the instant case does not, to all legal intents and purposes, amount to an empounding of the debtor's property and if in the end is permitted to proceed to a discharge, then it is a valid common law assignment and does not invade the field of the national bankruptcy act.

Tested by the language of the assignment and the order of the court, all the property of the Boyd Company is turned over to the trustees with full power to administer it, mortgage it, sell and dispose of it. This property of the debtor is thus completely empounded and placed beyond the ordinary remedy of attachment and garnishment by the provisions of Section 128.06.

Tested by the inevitable result of these assignment proceedings if permitted to proceed, the property of this corporation will be disposed of and distributed among such creditors as have filed their claims and the corporation be discharged of its debts, just as effectually as though an order of the court were made barring all creditors who

have not so filed. It is simply an ingenious way of going through bankruptcy under the guise of a common law assignment. There remains, after this trust is complied with, no property of the Boyd Company and no personal liability on the part of its stockholders. The corporation is discharged of its debts and its creditors are barred of any remedy.

[fol. 58] So much for the mere logic of the general rule relating to assignments under state laws that directly or indirectly invade the field of the national bankruptcy act.

The Tarnowski case is authority for holding that the saving clause of Chapter 128, originally Chapter 334 of the Laws of 1897, is a separate and distinct enactment in addition to the Wisconsin laws upon insolvency adopted before the bankruptcy act, and contains besides the saving clause, a provision for distribution and a discharge feature. As I remember the decision in the Tarnowski case, it is authority for holding that the entire enactment fails because it contains the discharge feature. In my opinion, this must eliminate from further consideration, what our courts have previously said in the case of Mayfield Woolen Mills vs. Goodrich and Martineau Co., 189 Wis. 406, because with this saving clause inoperative we are back where we were in Winner vs. Hoyt, 66 Wis. 227, which held that non assenting creditors might resort to garnishment.

In the opinion of Mr. Justice Rosenberry in the Hazelwood case above referred to, much is said that is obiter in regard to the case at bar, for in the Hazelwood case an entirely different situation is presented and that case arose under a different statute, Sec. 286.10, which has no relation to voluntary assignment for the benefit of creditors. It is nowhere suggested that the equity powers of the courts of Wisconsin to preserve property in the course of litigation by the appointment of receivers, is in any wise an invasion of the field covered by the national bankruptcy act. So what the Chief Justice had to say in the Hazelwood case in respect to the wide differences in the Arkansas statute upon which the rule in the Pinkus case rests, and our own assignment law, is obiter. But, it is nevertheless interesting as showing that in fact it is a mere difference in words and not in the legal effect of the [fol. 59] two state statutes.

There is no difference in effect between the Arkansas statute which requires as a condition for participating in the estate, that the creditor execute and deliver a release to the debtor, and the Wisconsin statute which provides that the creditor who does not file his claim will receive no dividends and then proceeds to distribute all the assets of the debtor. As far as the non-filing creditor is concerned, it is just as effectually a discharge of the debtor as the proceeding under the Arkansas statute can possibly be.

So far as the plaintiff in this case now under consideration is concerned, he stands in the position of a single creditor who could not alone invoke the involuntary features of the National bankruptcy act. He has not filed in the assignment proceeding. The assignor is admittedly insolvent. In my opinion, the plaintiff comes squarely within the rule of a person or corporation permitted to obtain a preference under the rule in the Pinkus case.

So, with all due respect to eminent authority to the effect that the discharge feature of the national bankruptcy act is the very essence of the act, I am still of the opinion that the prime purpose of that act in the first instance was to provide a uniform method for the just and equitable distribution of the assets of the estates of bankrupts among creditors and to avoid confusion and conflict among the different states in the administration of such estates, and that the discharge feature was secondary in the minds of Congress when the act was passed. This, from the language of the Pinkus case, seems too plain and significant to admit of serious dispute:

[fol. 60] "It is clear that the provisions of the Arkansas law governing the distribution of property of insolvents for the payment of their debts and providing for their discharge governing the *distribution of property of insolvents, for the purpose of payment of their debts*, and providing for their discharge, or *that otherwise relate to the subject of bankruptcy*, are within the field entered by Congress when it passed the bankruptcy act and therefore such provisions must be held to have been superseded."

So I fail to see a substantial difference between the statutes of Arkansas and the provisions of Chapter 128 of

this state, or this common law assignment, if we choose to so regard it. The difference is in words only. In either case, it is an invasion of the field of the national bankruptcy act and void in toto. The position of the garnishee defendants is a mere play upon words, a legal beating of the devil around the bush.

As indicative of the interpretation that has been placed upon the phrase "invasion of the field of the national bankruptcy act" attention is called to the case of Adrian State Bank et al. vs. Klinkhammer (Minn.), 233 N. W. 588. This suit was brought in an attempt to invoke the involuntary provisions of Chapter 90 of the general statutes of Minnesota as against the defendant, who was a farmer and not subject to the involuntary provisions of the national bankruptcy act. Minnesota has a statute similar to Chapter 128 of the Wisconsin Statutes, and it was under this state statute that the defendant Klinkhammer was thrown into involuntary bankruptcy and a receiver appointed for the purpose of carrying out the provisions of the chapter. It is significant also to note that this chapter suffered somewhat the same fate as Chapter 128 of the Wisconsin statutes suffered in that in 1923 the chapter of the Minnesota statutes relating to involuntary bankruptcy was omitted by the revisor for the reason that the compilers considered the chapter as inoperative while the national bankruptcy act was in force. So the sole question presented to the [fol. 61] Supreme Court of Minnesota was whether or not the involuntary provisions of Chapter 90 may be invoked against a person who is not subject to the involuntary provisions of the national bankruptcy act.

The district court held this chapter of the Minnesota statute could be invoked for that purpose, but it was held on appeal from the decision of the trial court that it was an invasion of the field of the national bankruptcy act and among other things this language was used:

"We are convinced that while the national bankruptcy act * * * is in force, Chapter 90 of the General Statutes of 1913 is in abeyance and inoperative as to farmers, because it attempts to act within the field appropriated by Congress under the national bankruptcy act. To hold otherwise would result in endless confusion and would circumvent the purpose of the act of Congress which evidently

intended to protect the farmer from involuntary bankruptcy proceedings. If we were to hold that Chapter 90 might be invoked for the purpose of distribution of assets alone and that only the provisions for the release of debtors is to be inoperative during the time that the national bankruptcy act is in effect, the insolvency act would be used for the purpose of forcing farmers to take voluntary proceedings under the national bankruptcy act, thus accomplishing indirectly what Congress did not directly permit."

Even as a common law assignment and independently of the national bankruptcy act, this assignment is, in my opinion void for three reasons: 1, in limiting the liability of the trustees; 2, in authorizing the sale of assets upon credit, and 3, in authorizing the continuing of business, the incurring of expenses and mortgaging of property. I fully agree with counsel for the plaintiff that such provisions tend to hinder and delay creditors and makes the entire assignment void.

Vernon vs. Upson, 60 Wis. 418.

It follows from the foregoing that the plaintiff is entitled to judgment upon the pleadings as prayed for in the motion, with costs.

[fol. 62] This case was tried jointly with a case of Fred Klein Sr. against the same defendants and same garnishee defendants, and the case of Mrs. J. H. Pobreslo vs. Guaranty Mortgage Corporation and The Joseph M. Boyd Company, defendants, and the same garnishee defendants. The latter two cases are similar in every respect to the case I have just now decided and hence no separate opinion is necessary to be filed in the latter two cases. The plaintiff in each of those cases, is also entitled to judgment upon the pleadings with costs.

Dated at La Crosse, Wisconsin, this 15th day of January, 1932.

By the Court:

R. S. Cowie, Judge.

[fol. 63] [File endorsements omitted]

IN CIRCUIT COURT OF DANE COUNTY

[Title omitted]

ORDER FOR JUDGMENT—Filed Jan. 27, 1932

At a General Term of the above Court held at Madison, Wisconsin, and on January 27th, 1932.

Present: The Honorable R. S. Cowie, Circuit Judge, Presiding.

The above entitled action coming on to be heard before the Court without a jury on the 21st day of December, 1931, on motion by the plaintiff, by Olin and Butler, her attorneys, for judgment on the pleadings, and Edward J. Samp, by his attorneys, Bagley, Spohn & Ross, having appeared and filed an answer on his own behalf and on behalf of the defendants Leo T. Crowley, Clarence E. Karn and L. D. Atkinson,

And it appearing that this action is a garnishment proceeding ancillary to an action in favor of the plaintiff and against the defendant The Joseph M. Boyd Company, in which action judgment was rendered in the Circuit Court for Dane County on December 19, 1931, in favor of the plaintiff and against the defendant The Joseph M. Boyd Company in the sum of Two Thousand Six Hundred Forty-five and 94/100 Dollars ($2,645.94), which judgment remains wholly unpaid,

[fol. 64] And it appearing that the garnishee summons and affidavits in the above entitled action were served upon the defendant and the garnishee defendants at the time of the service of the summons in said principal action, all of which services were made on July 30, 1931, and it appearing from the said answer of Edward J. Samp that at the time of the service of the garnishee proceedings herein the defendants Leo T. Crowley, Clarence E. Karn and L. D. Atkinson had in their possession and under their control property, moneys, credits and effects belonging to the defendant Joseph M. Boyd Company vastly in excess of the amount of plaintiff's claim, and it appearing further that subsequent to the service of the said garnishee process the said gar-

nishee defendants surrendered and transferred all of said assets to the said Edward J. Samp, who had knowledge of the existence of the said garnishment proceedings, and the court having heretofore filed its memorandum decision in the case of Frank J. Hess vs. Joseph M. Boyd Company, Defendant, and Leo T. Crowley, Clarence E. Karn, and L. D. Atkinson, Garnishee Defendants, pending in the Circuit Court for Dane County, which was tried herewith,

And it appearing from the answer of the said Edward J. Samp that he now has possession of the said assets and property of the defendant, The Joseph M. Boyd Company, and having answered in the said action, has voluntarily subjected himself to the jurisdiction of the court and has made himself a party to this action.

Now, therefore, upon all of the papers, documents, etc., heretofore filed or served in this action, and upon motion of Olin and Butler, Attorneys for the plaintiff,

It is ordered:

[fol. 65] 1. That all of the proceedings in the above entitled action be and they are hereby amended to make the said Edward J. Samp a party as a garnishee defendant.

2. That judgment be entered in favor of the plaintiff and against the garnishee defendants in accordance with the memorandum decision above referred to ordering and adjudging:

(a) That said garnishee defendants are liable as garnishees aforesaid.

(b) That within ten days after service upon him or upon his attorneys of a copy of the judgment herein, the said Edward J. Samp should deliver to the Sheriff of Dane County any and all moneys in his hands belonging to The Joseph M. Boyd Company and received by him by virtue of the assignment by The Joseph M. Boyd Company to the defendants Leo T. Crowley, Clarence E. Karn and L. D. Atkinson and by them transferred to the said Edward J. Samp, or a sufficient amount thereof to satisfy the judgment of the plaintiff in full, to be applied to the satisfaction of plaintiff's said judgment against the defendant.

(c) That if the cash so paid over be not sufficient, the said Edward J. Samp shall turn over to the Sheriff of Dane County, within ten days after service of a copy of the judg-

ment herein, all of the property, credits, effects and assets in his hands belonging to the said Joseph M. Boyd Company.

(d) That the said Sheriff shall thereupon sell and dispose of the said property above described in the same manner as if levied upon execution, the proceeds to be applied [fol. 66] toward the satisfaction of the said judgment against The Joseph M. Boyd Company and the costs of this action, and that the Sheriff shall make due return of such sale.

(e) That if, upon the filing of the Sheriff's report it shall appear that the amounts paid over to the Sheriff or the amounts realized by him upon such sale are insufficient to pay the amount of the plaintiff's judgment, with costs, then the plaintiff may apply to the court for further order and judgment against the garnishee defendants for any deficiency so arising.

Let judgment be entered accordingly.
By the Court:

R. S. Cowie, Judge.

[fol. 67] [File endorsements omitted.]

[fol. 68] [File endorsements omitted]

In Circuit Court of Dane County

Mrs. J. H. Pobreslo, Plaintiff,

vs.

Guaranty Mortgage Company and The Joseph M. Boyd Company, Defendants; Leo T. Crowley, Clarence E. Karn, L. D. Atkinson, and Edward J. Samp, Garnishee Defendants

Judgment—Filed Jan. 27, 1932

At a General Term of the above Court held at Madison, Wisconsin, and on January 27th, 1932.

Present: The Honorable R. S. Cowie, Circuit Judge, Presiding.

This action having been tried before the court, Honorable R. S. Cowie, Circuit Judge, presiding, and the court having filed its memorandum opinion and having filed its order for judgment which is on record;

And the plaintiff having recovered judgment against the defendant Joseph M. Boyd Company, in the principal action for the sum of Two Thousand Six Hundred Forty-Five and 94/100 Dollars ($2,645.94), damages and costs, and the court having ordered and directed judgment as herein adjudged against the garnishee defendants;

Now, on motion of Olin and Butler, attorneys for the plaintiff,

It is ordered and adjudged:

(1) That all of the proceedings in the above entitled action be, and they are, hereby amended to make the said Edward J. Samp a party as a garnishee defendant.

[fol. 69] (2) That the said garnishee defendants are liable as garnishees aforesaid.

(3) That within ten days after service upon him or upon his attorneys of a copy of this judgment, the said Edward J. Samp shall deliver to the sheriff of Dane County any and all moneys in his hands belonging to the Joseph M. Boyd Company, and received by him by virtue of the assignment by the Joseph M. Boyd Company to the defendants Leo T. Crowley, Clarence E. Karn and L. D. Atkinson, and by them transferred to the said Edward J. Samp, or a sufficient amount thereof to satisfy the judgment of the plaintiff in full to be applied to the satisfaction of plaintiff's said judgment against the defendant.

(4) That if the cash so paid over be not sufficient to pay the said judgment in full, the said Edward J. Samp shall turn over to the sheriff for Dane County within ten days after such service of a copy of this judgment all of the property, credits, effects and assets so in his hands belonging to the said Joseph M. Boyd Company.

(5) That the said sheriff shall thereupon sell and dispose of the said property above described in the same manner as if levied upon execution, the same to be applied toward the satisfaction of the said judgment against the Joseph M. Boyd Company, and the costs of this action, and the said sheriff shall make due return of said sale.

(6) That the said plaintiff do have and recover of the said defendants in addition to their liability as garnishee the sum of $83.29, her costs of this action, and that the plaintiff have execution therefor.

(7) That if upon filing of the sheriff's report it shall appear that the amounts paid over to the sheriff, or the amounts realized by him upon such sale, are insufficient to pay the amount of the plaintiff's judgment with costs, then [fol. 70] the plaintiff may apply to the court upon notice to all parties for further order and judgment against the garnishee defendants for any deficiency so arising.

(8) That the said garnishees be, and they are, hereby acquitted and discharged from all demands by the said defendant Joseph M. Boyd Company, or their representatives, for all money, goods, effects and credits which they shall have paid, delivered or accounted for by force of this judgment.

By the Court:

R. S. Cowie, Judge.

[fols. 71-73] [File endorsements omitted.]

[fols. 74 & 75] In Supreme Court of Wisconsin

Mrs. J. H. Pobreslo, Respondent,

vs.

Guaranty Mortgage Corporation and The Joseph M. Boyd Company, Defendants; Clarence E. Karn, L. D. Atkinson and Leo T. Crowley and Edward J. Samp, Garnishee Defendants and Appellants

Dane Circuit Court

Opinion by Justice Nelson

Judgment—May 10, 1932

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County, and was argued by counsel. On consideration whereof, it is now here

ordered and adjudged by this Court, that the judgment of the circuit court of Dane County, in this cause, be and the same is hereby reversed, with costs against the said respondent taxed at the sum of —, and that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to set aside the judgment herein and to dismiss the garnishee action.

[fol. 76] [File endorsement omitted]

IN SUPREME COURT OF WISCONSIN, JANUARY TERM, 1932

No. 217

Mrs. J. H. PROBRESLO, Plaintiff,

vs.

JOSEPH M. BOYD COMPANY, Defendant, and Clarence E. KARN, L. D. Atkinson, Leo T. Crowley, and Edward J. Samp, Garnishee Defendants

Appeal from a Judgment of the Circuit Court for Dane County, R. S. Cowie, Circuit Judge

Reversed

OPINION—Filed May 10, 1932

This is a garnishment proceeding commenced on the 30th day of July, 1931, ancillary to an action brought by the plaintiff. The facts are not in dispute and the judgment appealed from was rendered against the garnishee defendants pursuant to plaintiff's motion for judgment on the pleadings.

The defendant, Joseph M. Boyd Company, hereinafter called the defendant, is a Wisconsin corporation which, prior to March 23, 1931, was engaged in the business of selling securities, loaning money and selling property on credit. On March 23, 1931, being financially involved, it made a voluntary assignment of all of its property for the benefit of its creditors, to Leo T. Crowley, Clarence E. [fol. 77] Karn and L. D. Atkinson. The assignment was made pursuant to a resolution of its stockholders and was

evidenced by a writing executed in its behalf by Joseph M. Boyd and R. H. Farness, president and assistant secretary respectively of the company. The three assignees mentioned, each individually in writing, accepted the assignment and the trusts thereby created. The assignees immediately took possession of all of the property of the company and on the same day the circuit court for Dane county assumed jurisdiction over the proceeding. In the written assignment mentioned no reference was made to ch. 128 of the Wisconsin Statutes but the order signed by the circuit court, on assuming jurisdiction and supervision over the administration of the assets and property of the company, recited that it was done "pursuant to law, and particularly under and pursuant to the provisions of Chapter 128 of the Statutes of the State of Wisconsin". The assignees took possession of the company's assets before furnishing any bond. Nineteen days thereafter the three assignees filed separate bonds, each in the sum of $10,000. The total amount of the three bonds did not equal the value of the assets of the company. The value of the assets was at no time determined by the oath of witnesses as required by sec. 128.06, Stats. The assignees did not, in the presence of the county judge or of a court commissioner, endorse on the assignment, their consent to take upon themselves the faithful discharge of the trusts as required by law. (Sec. 128.12, Stats.) The assignors also failed to file an inventory. (128.13). The assignees were expressly author-[fol. 78] ized to submit themselves to the jurisdiction of the circuit court for Dane county and said court evidently took jurisdiction of said matter under the provisions of ch. 128. The court ordered the publication of notices to creditors pursuant to sec. 128.14, and required the filing of proof in accordance with sec. 128.15. The plaintiff did not file her claim pursuant to the provisions of ch. 128, but on July 30, 1931, commenced an action against the company and also a garnishment action against the assignees. The time for answering was extended by consent of the parties. On December 4, 1931, the assignees named in said instrument dated March 23, 1931, resigned; and at the same time, pursuant to resolutions of the company, an amendment was made to the original instrument of assignment. The circuit court, on December 10, 1931, entered an order accepting the resignation of the trustees and appointed Edward J.

Samp as the sole trustee for the administration of the trust. After the resignation of the three assignees and the appointment of Samp as sole trustee, the pleadings were amended so as to make him a garnishee defendant in addition to the three original assignees. Edward J. Samp, as garnishee defendant, made and filed his answer in which the assignment proceedings were recited and in which it was denied that either he or the original assignees had, at the time of the service of the garnishee summons, or at any time thereafter, possession or control of any real estate or personal property belonging to the company or in which it had any interest.

The amended assignment specifically provided that it should be "deemed a common law assignment". The amended assignment further authorized the trustees, if they [fol. 79] deemed it advisable, "to conduct and continue the business heretofore operated or conducted" by the company and to borrow money if they deemed it necessary for the continuance of the business. The amended assignment further provided that the assignees should "pay all debts which are by law entitled to be paid in full in priority to other debts as provided in the Acts of Congress relating to bankruptcy and in the order of priority as therein provided." The trustees were further authorized to "postpone the sale and collection of any part of said property for such time as is consistent with reducing the same to money, until the same can be wisely and prudently done." The amended assignment also provided, in respect to the liability of the trustees as follows:

"The trustees shall not be liable for the consequences of any oversight or error in judgment, and shall be answerable only for their own acts, receipts and defaults, and not for those of any person employed by them, and selected with reasonable care, nor for any loss unless the same happens through their own wilful default."

Additional facts will appear in the opinion. The plaintiff moved for judgment against the garnishee defendants upon the plaintiff's garnishee affidavit and the affidavit and answer of the defendants. The plaintiff's motion was granted and judgment rendered against the garnishee defendants.

[fol. 80] NELSON, J.:

The plaintiff contends that the assignment herein is wholly void and inoperative because the assignees took immediate possession of the property and assets of the company without furnishing a bond as required by sec. 128.06; because the giving of the three separate bonds was not in compliance with said section for the reason that the assets of the company greatly exceeded the sum of $30,000; because the assets of the company at no time were ascertained by the oath of witnesses and of the assignor as required by sec. 128.06; because neither the said assignment nor a full and true copy thereof was at any time delivered to the county judge or a court commissioner; because the assignees did not, in the presence of the county judge or court commissioner, endorse upon the assignment, their consent to take upon themselves the faithful discharge of the duties specified therein; because they did not, within twenty days after the execution of the assignment, make and file, in the office of the clerk of the circuit court for Dane county, an inventory of the assets and a list of the creditors of the company as required by sec. 128.13; and finally, because neither the said court nor the said trustees had jurisdiction or authority to administer the assets of the company because such jurisdiction is in conflict with the provisions of the Federal Bankruptcy Act.

It appears that the three separate bonds were executed and filed pursuant to the order of the court and that in lieu of an inventory of assets and a list of creditors, a report of the company, by certified public accountants, was filed.

[fol. 81] Various contentions are made by the parties in the carefully prepared briefs submitted by them, but in the view we take of this case but two questions require determination.

1. May the provisions of ch. 128, which pertinently relate to voluntary assignments for the benefit of creditors, be severed from the other provisions of said chapter which concededly amount to insolvency proceedings, in that they provide for the discharge of insolvent debtors?

2. If the provisions of ch. 128 regulating voluntary assignments for the benefit of creditors may be severed from the other provisions of said chapter, then are such provisions relating to such assignments for the benefit of creditors, suspended so long as the Federal Bankruptcy Act shall be in force and effect, because in conflict therewith?

A careful reconsideration and review of the history of our statutes regulating voluntary assignments for the benefit of creditors and those relating to insolvency proceedings, leads to the same conclusion reached in In re Voluntary Assignment of Tarnowski, 191 Wis. 279, 210 N. W. 836. In that case the development of our laws relating to assignments for the benefit of creditors as well as those relating to our insolvency proceedings, was carefully reviewed. In that case it was contended that our statutory regulations relating to voluntary assignments for the benefit of creditors were separate and distinct from the provisions of our statutes providing for the discharge of insolvent debtors from their debts. The following cases were cited to support such contention. Binder v. McDonald, 106 Wis. 332, 82 N. W. 156; Segnitz v. Garden City B. & T. [fol. 82] Co., 107 Wis. 171, 83 N. W. 327; Duryea v. Muse, 117 Wis. 399, 94 N. W. 365. After reviewing the several enactments leading up to the then existing law, the court, speaking through Mr. Justice Owen, said (p. 286):

"It follows, therefore, that the features of our voluntary assignment act are separate and distinct from the discharge features first enacted as ch. 385, Laws of 1899."

A careful consideration of all of the acts of the legislature, which are now incorporated into ch. 128 of the statutes, reveals the clear intention of the legislature to provide for two separate and distinct proceedings, one relating to assignments for the benefit of creditors and the other relating to the discharge of insolvent debtors. In view of the recent review by this court of the several enactments leading up to ch. 128, as it now exists, we content ourselves by referring to the opinion in the Tarnowski case. There exists in our minds no question as to the plain duty of this court to construe the several provisions of ch. 128, relating to assignments for the benefit of creditors,

as separate and distinct from the other provisions of said chapter relating to the discharge of insolvent debtors.

The question now arises as to whether the Federal Bankruptcy Act operates to suspend the provisions of ch. 128 relating to assignments for the benefit of creditors. No doubt can longer exist that all state insolvency laws which provide for the discharge of insolvent debtors, are suspended during the existence of the Federal Bankruptcy Act. If a state law is an insolvency law, the authorities are all to the effect that such law is suspended and wholly superseded by the Federal Bankruptcy Act.

In the Tarnowski Case it was held that the discharge features of our law are suspended by the Federal Bank- [fol. 83] ruptcy Act but that the provisions regulating voluntary assignments for the benefit of creditors do not contravene the Federal Bankruptcy Act and are still in force. The plaintiff, however, contends that the decision in the Tarnowski Case should be considered overruled by International Shoe Co. v. Pinkus, 278 U. S. 261. The plaintiff contends that the following language is amply broad to cover state laws regulating assignments for the benefit of creditors:

"In respect of bankruptcies the intention of Congress is plain. The national purpose to establish uniformity necessarily excludes state regulation. It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas statute, that intolerable inconsistencies and confusion would result if that insolvency law be given effect while the national Act is in force. Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bakruptcy Act and that specified in the state insolvency law. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations. Prigg v. Pennsylvania, 16 Pet. 539, 617, 618. Northern Pac. Ry. v. Washington, 222 U. S. 370, 378, et seq. St. Louis, Iron Mt. & S. Ry. v. Edwards, 227 U. S. 265. Erie R. R. Co. v. New York, 233 U. S. 671, 681, et seq. New York Central R. R. Co. v. Winfield, supra. Erie R. R. Co. v. Winfield, supra. Oregon-Washington Co. v. Washington, 270 U. S. 87, 101."

This language, considered separately and apart from the opinion in which it appears, might be considered sufficiently broad (although it quite clearly relates to insolvency proceedings and to involuntary proceedings commenced by creditors against insolvent debtors), to justify the conclusion that any proceeding which provided for the ratable distribution of property of insolvents among credtors, is within the field entered by Congress when it passed the Bankruptcy Act. Such a conclusion, however, is not justified when prior decisions of the United States Supreme Court are given consideration. In Mayer v. Hellman, 91 U. S. 496, which in- [fol. 84] volved an assignment for the benefit of creditors under the laws of the state of Ohio and in which the main question involved was whether an adjudication in bankruptcy had the effect of suspending the further operation of the state assignment laws, and in which it was specifically and earnestly contended that such law was an insolvent act even though it did not purport to discharge the debtor from paying his debts, it was said, by Mr. Justice Field, speaking for the court (p. 502):

"In the argument of the counsel of the defendant in error, the position is taken that the Bankruptcy Act suspends the operation of the act of Ohio regulating the mode of administering assignments for the benefit of creditors, treating the latter as an insolvent law of the State. The answer is, that the statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments; it assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustee for the discharge of their duties; it requires them to file statements showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must,

therefore, be regarded as though the statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that State; but the assignment in question was not made in pursuance of any of its provisions. The position, therefore, of counsel, that the Bankruptcy Law of Congress suspends all proceedings under the Insolvent Law of the State, has no application.

"The assignment in this case being in our judgment valid and binding, there was no property in the hands of the plaintiffs in error which the assignee in bankruptcy could claim. The assignment to them divested the insolvents of all proprietary rights they held in the property described in the conveyance. They could not have maintained any action either for the personalty or realty. There did, indeed, remain to them an equitable right to have paid over to them any remainder after the claims of all the creditors were satisfied. If a contingency should ever arise for the assertion of this right, the assignee in bankruptcy may perhaps have a claim for such remainder, to be applied to the payment of creditors not protected by the assignment, and whose demands have been created subsequent to that instrument. Of this possibility we have no occasion to speak now."

[fol. 85] Later on in Boese v. King, 108 U. S. 379, which involved a general assignment for the benefit of creditors made under the laws of the state of New Jersey, which provided for the administration of the assets of debtors who made assignments for all of their assets to trustees for creditors, and for their discharge from liabilities to creditors who shared in the distribution, it was held that the New Jersey statute was inoperative in so far as it provided for the discharge of the debtor. It was held by a divided court as follows (p. 385):

"Undoubtedly the local statute was, from the date of the passage of the Bankrupt Act, inoperative in so far as it provided for the discharge of the debtor from future liability to creditors who came in under the assignment and claimed to participate in the distribution of the proceeds of the assigned property. It is equally clear, we think, that the assignment by Locke of his entire property to be disposed of as prescribed by the statute of New Jersey, and

therefore independently of the bankruptcy court, constituted, itself, an act of bankruptcy, for which, upon the petition of a creditor filed in proper time, Locke could have been adjudged a bankrupt, and the property wrested from his assignees for administration in the bankruptcy court. In re Burt, 1 Dillon, 439, 440; In re Goldschmidt, 3 Bank. Reg. 164; In Matter of Seymour T. Smith, 4 Bank. Reg. 377. The claim of Pickhardt and Kutroff existed at the time of the assignment. The way was, therefore, open for them, by timely action, to secure the control and management of the assigned property by that court for the equal benefit of all the creditors of Locke. But they elected to lie by until after the expiration of the time within which the assignment could be attacked under the provisions of the Bankrupt Act; and now seek, by this suit in the name of the plaintiff in error, to secure an advantage or preference over all others; this, notwithstanding the assignment was made without any intent to hinder, delay, or defraud creditors. In order to obtain that advantage or preference, the plaintiff in error relies on the paramount force of the Bankrupt Act, the primary object of which, as this court has frequently announced, was to secure equality among the creditors of a bankrupt. Mayer v. Hellman, 91 U. S. 496-501; Reed v. McIntyre, 98 U. S. 507-509; Buchanan v. Smith, 16 Wall. 277. It can hardly be that the court is obliged to lend its aid to those who, neglecting or refusing to avail themselves of the provisions of the act of Congress, seek to accomplish ends inconsistent with that equality among creditors which those provisions were designed to secure. If it be assumed, for the purposes of this case, that the statute of New Jersey was, as to each and all of its provisions, suspended when the Bankrupt [fol. 86] Act of 1867 was passed, it does not follow that the assignment by Locke was ineffectual for every purpose. Certainly, that instrument was sufficient to pass the title from Locke to his assignees. It was good as between them, at least until Locke, in some appropriate mode, or by some proper proceedings, manifested a right to have it set aside or cancelled upon the ground of a mutual mistake in supposing that the local statute of 1846 was operative. And in the absence of proceedings in the bankruptcy court impeaching the assignment, and so long as Locke did not object, the assignees had authority to sell the property

and distribute the proceeds among all the creditors, disregarding so much of the deed of assignment as required the assignees, in the distribution of the proceeds, to conform to the local statute."

Still later on in Stellwagen v. Clum, 245 U. S. 605, Mayer v. Hellman, supra, was referred to, apparently with full approval, the court quoting at length from that case, and further saying (p. 617):

"The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature of the law—as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life. Neal v. Clark, 95 U. S. 704, 709; Tear v. Clews, 115 U. S. 528, 541; Hanover National Bank v. Moyes, 186 U. S. 181, 192; Wetmore v. Markoe, 196 U. S. 68, 77; Burlington v. Crouse, 228 U. S. 459, 473. This feature of the bankruptcy law is wholly wanting in the Ohio statutes under consideration. Indeed, there is not now, any more than when Mayer v. Hellman, supra, was decided, any attempt in the Ohio laws to provide for the discharge of the debtor from his existing debts."

These decisions of the United States Supreme Court seem squarely to hold that laws which merely regulate assignments for the benefit of creditors are not insolvency laws and are therefore not in conflict with the Federal Bankruptcy Act.

It is, of course, clear that the provisions of the Federal Act, ch. 3, sec. 3a subsec. 4, make a general assignment for [fol. 87] the benefit of creditors an act of bankruptcy. No authority need be cited to the point that when an assignment for the benefit of creditors is made, all proceedings in the state court may be superseded by the federal court if a petition in bankruptcy is filed within four months from such act of bankruptcy.

But the plaintiff earnestly contends that the holdings in the three United States Supreme Court cases just reviewed must be considered overruled by International Shoe Co. v. Pinkus, supra. A careful reading of that decision impels the conclusion that plaintiff's contention is unsound. That case involved proceedings under an Arkansas statute which provided for the commencement of a suit in the chancery court by the insolvent, praying to be so adjudged, and for the appointment of a receiver to take and distribute his property as directed by that statute. The plaintiff therein was adjudged insolvent, a receiver was appointed, who was directed to take the property of the insolvent and liquidate it, and creditors were directed to make proof of their claims "with the necessary stipulation that they will participate in the proceeds in full satisfaction of their demands." This statute was held by the court to be an insolvency law, the court saying (p. 264):

"The Arkansas statute is an insolvency law. It is so designated in its title (Acts of Arkansas, 1897) and in the revision. C. 93, supra. The supreme court of the State treats it as such. Hickman v. Parlin-Orendorff Co., 88 Ark. 519. Baxter County Bank v. Copeland, 114 Ark. 316, 322. Morgan v. State, 154 Ark. 273, 279, 281. This case, 173 Ark. 316. Friedman & Sons v. Hogins, 175 Ark. 599. It provides for surrender by insolvent of all his unexempt property (sec. 5885) to be liquidated by a trustee for the payment of debts under the direction of the court. It classifies creditors, prescribes the order of payment of [fol. 88] their claims and gives preference to those fully discharging the debtor in consideration of pro rata distribution (sec. 5888). Mayer v. Hellman, 91 U. S. 496, 502. Stellwagen v. Clum, supra. Segnitz v. Garden City Co., 107 Wis. 171. In re Weedman Stave Co., 199 Fed. 948, and cases cited."

In that case Mayer v. Hellman, supra, Stellwagen v. Clum, supra, and Boese v. King, supra, were all cited with no intimation that the doctrines stated therein were not sound. In the very recent case of Straton v. New, 283 U. S. 318, the three cases just mentioned were cited in the opinion with no intimation that they were overruled. Referring to Stellwagen v. Clum, supra, it was said (p. 327):

"It was pointed out in Stellwagen v. Clum, supra, that state laws which provide for sale and distribution of a debtor's property may not amount to insolvency laws; and it was there held that such laws, if not inconsistent with the administration of the bankruptcy act, are available to litigants. Appellees must therefore show that the statutory action of the state court is, in fact, an insolvency proceeding. The certificate states no facts which lead to such a conclusion, nor does it so denominate the creditors' suit. Reference to the statutes of West Virginia, of which we take judicial notice, demonstrates that it is not in that category."

It is inconceivable that so eminent a court would intend to overrule three of its former decisions without specifically so stating. The intention of that court to overrule former decisions is generally expressed by apt and unambiguous language. There is nothing in the Pinkus or Straton Cases which justifies the contention that the former decisions of [fol. 89] that court reviewed herein, were intended to be overruled.

Until the Supreme Court of the United States clearly manifests its intent to overrule its former decisions, by holding that state statutes, regulating voluntary assignments for the benefit of creditors, are suspended by the Federal Bankruptcy Act, we are not disposed to hold that such regulatory laws conflict with the Federal Bankruptcy Act, or that proceedings thereunder may not be taken and carried through, unless superseded by properly, and in a timely manner, invoking the jurisdiction of a bankruptcy court. We perceive in the regulatory provisions of ch. 128, stats., relating to voluntary assignments for the benefit of creditors many provisions which operate to the benefit of both debtors and creditors. To strike down voluntary assignments for the benefit of creditors, would be to destroy ancient, expeditious and well recognized proceedings which have proved of great value not only to insolvent debtors, to debtors not actually insolvent, but in financial distress, and to creditors. We have no thought or intention of questioning the right of Congress to occupy exclusively the bankruptcy field but we fail to find any provision of the bankruptcy act or any decision of the United States Supreme Court construing it, which forbid voluntary assignments

for the benefit of creditors, when not superseded by bankruptcy proceedings.

But the plaintiff further contends that, even assuming that our assignment laws are not suspended by the Federal Bankruptcy Act, the assignment herein is void because the assignees took possession of the assets before giving proper [fol. 90] bond, because no adequate bond was ever given, because no appraisal was made and filed and because no inventory was furnished. It is conceded that the provisions of ch. 128, in the respects mentioned, were not complied with. The plaintiff contends that non-compliance with the statute in the respects mentioned rendered the assignment absolutely void. Under the law as it existed prior to the enactment of ch. 334 of the laws of 1897, the contentions of the plaintiff would be absolutely sound. However, by said chapter there was added to sec. 128.06, stats., the following plain and specific language:

"No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of insolvency of any debtor, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void under the provisions of this act. And in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all creditors of such insolvent debtor under the direction of the court, by the assignee or any receiver of said property and estate appointed as hereinafter provided."

In Gilbert Paper Co. v. Whiting Paper Co., 123 Wis. 472, 102 N. W. 20, the above language of ch. 334, Laws of 1897, first came before this court. After referring to the rules of former cases and to the statute itself, this court, speaking through Mr. Justice Dodge, said (p. 478):

"We can entertain no doubt that this legislation was aimed directly at the rule laid down in Winner v. Hoyt, supra, and following cases, that property attempted to be conveyed by a void voluntary assignment could be seized by any individual creditor by attachment or garnishment. Indeed, its words are too plain to invite or permit attempt to construe it upon that subject. We can but enforce it."

See also Plewa v. St. Josaphats Congregation, 153 Wis. 276, 141 N. W. 267, and the recent case of Mayfield Woolen Mills

[fol. 91] v. Goodrich & Martineau Co., 189 Wis. 406, 207 N. W. 554, in which the language of Mr. Justice Dodge was quoted with complete approval.

The plaintiff further contends that the amended assignment herein cannot be sustained as a common law assignment. We need give no consideration to such contention for the reason that the assignment herein was, in any event, an attempt to make an assignment for the benefit of creditors. Of this there can be no doubt. The plaintiff's remedy therefore was that afforded by sec. 128.06, stats., as pointed out in Mayfield Woolen Mills v. Goodrich & Martineau Co., supra, p. 412.

The plaintiff has cited numerous cases found in the Federal Reporter, and has quoted extensively therefrom; these quotations considered by themselves, independently of the facts involved, might support the conclusion that discharge provisions found in the ordinary insolvency law are not essentials of a bankruptcy law, and that a state law which provides for the distribution of the assets of an insolvent debtor among his creditors, even though it has no discharge provision, is nevertheless suspended by the bankruptcy law. We have examined with great care the many decisions cited and conclude that they do not support the contention. What they do hold is that an assignment for the benefit of creditors is an act of bankruptcy and when thereafter the jurisdiction of a bankruptcy court is properly and in a timely manner invoked, all proceedings in the state courts, pursuant to voluntary assignments, are superseded. [fols. 92-94] See particularly, in re Smith, 92 Fed. 135; In re Starck Lumber Co., 114 Fed. 360; In re F. A. Hall, 121 Fed. 992; In re Salmon, 143 Fed. 395.

We have no quarrel with the holdings in these cases.

We conclude, therefore, that the provisions of ch. 128, relating to voluntary assignments for the benefit of creditors are properly severable from the remaining sections of said chapter; that so severed they are not in conflict with the Federal Bankruptcy Act; that an assignment for the benefit of creditors is an act of bankruptcy and all proceedings in the state court might be superseded by the federal bankruptcy act when the jurisdiction of the federal court is properly and in a timely manner invoked; that ch. 334 of the laws of 1897, constitutes a valid enactment and barred the plaintiff herein from bringing a garnishment action

against the assignees, even though the assignment would otherwise be void but for such saving clause. The judgment of the circuit court must, for the reasons stated, be reversed.

By the Court: Judgment reversed with directions to set aside the judgment herein and to dismiss the garnishee action.

[fols. 95 & 96] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED—Filed June 23, 1932

Comes now the appellant and adopts her assignments of error as her statement of the points to be relied upon and requests that there be printed by the Clerk for the hearing of this case:

Title of paper	Page of record
(1) Garnishee Affidavit	23-29
(2) Affidavit and Answer of Garnishees, with exhibits attached	30-49
(3) Decision of Trial Court	52-62
(4) Order for Judgment	63-66
(5) Judgment	68-70
(6) Opinion of Supreme Court of Wisconsin and Mandate	76-92
(7) Petition for Appeal—So much thereof as contains "Assignments of Error"	1-3

C. G. Mathys, J. H. Wegener, R. M. Rieser, Counsel for Appellant.

Service of a copy of the within statement admitted June 3, 1932.

Bagley, Spohn, Ross & Stevens, Attys. for Garnishee Defendants.

[fol. 97] [File endorsement omitted.]

Endorsed on cover: File No. 36,868. Wisconsin Supreme Court. Term No. 171. Mrs. J. H. Pobreslo, appellant, vs. Joseph M. Boyd Company, Clarence E. Karn, L. D. Atkinson, et al. Filed June 23, 1932. File No. 36,868.

FILE COPY

FILED
JUL 16 1932
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1932

No. 171

MRS. J. H. POBRESLO,

Plaintiff and Appellant,

vs.

JOSEPH M. BOYD COMPANY,

Defendant,

and

CLARENCE E. KARN, L. D. ATKINSON AND LEO T. CROWLEY AND EDWARD J. SAMP,

Respondents,

On Appeal from the Supreme Court of the State of Wisconsin.

STATEMENT AS TO JURISDICTION ON APPEAL

C. G. MATHYS
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Counsel for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1932

No. 171

MRS. J. H. POBRESLO,

Plaintiff and Appellant,

vs.

JOSEPH M. BOYD COMPANY,

Defendant,

and

CLARENCE E. KARN, L. D. ATKINSON AND LEO T. CROWLEY AND EDWARD J. SAMP,

Garnishee Defendants and Respondents.

STATEMENT AS TO JURISDICTION ON APPEAL

May it Please the Court:

Appellants in support of the jurisdiction of this Court to review the above entitled case on appeal, respectfully represent:

I.

STATUTORY PROVISIONS SUSTAINING JURISDICTION

Sec. 237 Judicial Code (U. S. C. A. Sec. 344) provides that:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be

had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ or error."

By Chap. 14, 45 Stat. at large 54, being the Act of January 31, 1928, the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

By Chap. 440, 45 Stat. at large 466, enacted April 26, 1928, the Act of January 31, 1928 was amended, providing the procedure for appeal followed in this case, and under which the appeal in this case was taken.

The appeal in this case is from the Supreme Court of the State of Wisconsin, the highest court in that state in which a judgment could be had. There was drawn in question in that suit the validity of Chapter 128, Wisconsin Statutes, and particularly of Chapter 334, Laws of 1897 of Wisconsin, (which now comprises the last fifteen lines of Sec. 128.06 and all of Sections 128.07 and 128.08, Wisconsin Statutes 1931), on the ground that the said statutory provisions in the laws of Wisconsin are suspended during the existence of the National Bankruptcy Act and the decision of the Supreme Court of the State of Wisconsin was in favor of the validity and continued operation and effect of said state laws.

II.

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL

The judgment sought to be reviewed was entered by the Supreme Court of the State of Wisconsin on the 10th day of May, 1932, based upon an opinion of that court rendered and filed on the same day, reversing the judgment of the trial court. (R. 73)*

The application for appeal was presented to the Honorable Marvin Rosenberry, presiding justice of the Supreme Court of the State of Wisconsin on June 1, 1932, and the appeal was allowed on said day. (R. 5) The citation was served and filed within the time required by the rules of this court, and the record was thereafter filed and docketed in this court on June 23, 1932.

III.

NATURE OF CASE AND RULING BELOW

This case involves the question as to whether during the pendency of the National Bankruptcy Act a general assignment for the benefit of creditors under Chapter 128, Wisconsin Statutes, was effective to withdraw the property of the assignor from the reach of garnishment by a non-assenting creditor who was unable to invoke the Bankruptcy Act. The trial court held that the state statute was suspended during the existence of the National Bankruptcy Act for the reason that the National Bankruptcy Act covered the same field as that occupied by the state law, and that the National Act was exclusive. The Supreme Court, reversing the trial court, held the contrary.

The defendant, Joseph M. Boyd Company, a Wisconsin corporation, engaged in the business of selling securities,

* All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the Supreme Court of the State of Wisconsin and on file with the Clerk of this Court. The record has not yet been printed.

loans and other investments to the public, while insolvent did on March 23, 1931, make a general assignment of all of its property for the benefit of creditors. (R. 24).

The Circuit Court for Dane County assumed jurisdiction over the supervision of the administration of the insolvent estate pursuant to the provisions of Chapter 128, Wisconsin Statutes. (R. 37).

The plaintiff, a creditor of the Joseph M. Boyd Company, did not in any manner participate in the proceedings in the state court, and on July 30, 1931, she commenced a garnishment action against the assignees.

The creditors of the Joseph M. Boyd Company are more than twelve in number, and the plaintiff, although she used due diligence to that end, was unable to invoke involuntary bankruptcy proceedings. (R. 28).

Chapter 128, Wisconsin Statutes, regulates the order of distribution of assets of insolvents in a manner less favorable to general creditors of the plaintiff's standing than the distribution provided by the Bankruptcy Act. (R. 27).

The assignees failed to file the bond in the time, manner and amount required by said Chapter 128, and in other respects failed to comply with the statute, and under the express provisions of Section 128.06 the assignment was therefore void. (R. 25, 26).

The trial court held the assignment void both for non-compliance with the said statutory regulations in respect to the bond and for the further reason that in any event the National Bankruptcy Act suspended all state laws regulating the distribution of insolvent estates. (R. 53-66).

The Supreme Court conceded the correctness of the contention that the assignment was void for non-compliance with the statutory regulations in respect to the bond, but held that Chapter 334 of the Laws of 1897 (now a part of Chapter 128) was a valid enactment and took away from

creditors the right of garnishment, the Supreme Court saying:

> ". . . that Chapter 334 of the Laws of 1897 constitutes a valid enactment and barred the plaintiff herein from bringing a garnishment action against the assignees even though the assignment would otherwise be void but for such saving clause." (R. 92).

The Supreme Court further held that the sections in Chapter 128 dealing with discharge (Sections 128.19 to 128.29) were severable from the balance of the chapter under the decision of the state court in *Re Tarnowski,* 191 Wis 279, 210 N. W. 836, and that inasmuch as those particular sections dealing with discharge had already been held to be suspended that Chapter 128 dealt merely with distribution of assets, and not with the discharge, and therefore was not an insolvency or bankruptcy law and was not suspended by the National Bankruptcy Act. (R. 91).

It was the plaintiff's contention that even though the said provisions in Chapter 128, looking toward the discharge of the debtor be separated from the balance of the chapter and discarded, even then the chapter is in conflict with the Bankruptcy Act. The state statutory provisions cover the matter of distribution of assets, which, plaintiff contends, is the primary element of a bankruptcy law. Distribution of assets under a voluntary assignment in Wisconsin is statutory.

In *Segnitz vs. Garden City Bank Co.,* 107 Wis. 171, 83 N. W. 327, the court said:

> " . . . and inasmuch as the distribution of the estate depends, not upon the will of the assignor, but upon the positive requirement of the lawmaking power, we can see no escape from the conclusion that in so far it becomes statutory, and not voluntary. "(p. 176).

In the *Matter of the Voluntary Assignment of the Milwaukee Sheep & Wool Co.*, 186 Wis. 320, 202 N. W. 693, the court said:

> "The entire procedure in an assignment is largely determined by the statute, and in order to be a valid assignment the statutory requirements must be complied with." (p. 326).

The court said further:

> "By way of reiteration, let it be said that the statutes on voluntary assignments are designed for the benefit of general, unsecured creditors. It was such object that the legislature had in mind when it enacted sec. 1701, above quoted." (p. 328)

Thus, wholly independent of the discharge provisions, the Wisconsin Court has designated its voluntary assignment law as being designed for the benefit of general unsecured creditors with a distribution of assets thereunder that is statutory, and not voluntary.

The strength of the plaintiff's contention in this respect is emphasized when it is considered that the assignor in this case is a corporation, and as to it a discharge from its debts is a mere empty formality.

The facts in this particular assignment present a stronger case of invalidity than if the assignment had been made pursuant to the regulatory provisions of the state voluntary assignment law. Had the assignment been made in compliance with the state law and been a valid, voluntary assignment, there might be some ground for claiming that the distribution thereunder was made pursuant to the will of the assignor and that it might be as a distribution wholly independent of the statute.

As we have pointed out above, this assignment was made without compliance with the statutory provisions in respect to the bond, and for that reason it was void and of no effect

except as it was saved by the provisions of Chapter 334 of the Laws of 1897. (See opinion Supreme Court, R. 92).

The Supreme Court held that Chapter 334, Laws of 1897, was a valid enactment. (R. 92). It is the plaintiff's contention that Chapter 334, Laws of 1897, incorporated into the voluntary assignment law a complete system of involuntary bankruptcy, including the discharge provision, and that it is wholly suspended by the National Bankruptcy Act.

Chapter 334, Laws of 1897, is now incorporated in the statutes and comprises the last fifteen lines of Section 128.06 and all of Sections 128.07, to 128.10 inclusive, which provisions are set forth in full in Appendix A. In effect this chapter provides that when, as in this case, an assignment is void, creditors shall not be allowed to attach or garnishee, but that the insolvent estate shall then be administered under the direction of the court by an assignee or receiver appointed by the court.

This is true, regardless of the wishes or desires of the assignor. So, from this point on, it is a wholly involuntary proceeding. The making of a void assignment is in effect made an act of bankruptcy. The whole proceeding, including distribution is statutory. Similar to the provisions of a bankruptcy law, this chapter provides that if a debtor shall confess a judgment or permit a preference by any creditor and shall not within ten days after a levy or attachment make a voluntary assignment for creditors, then two or more creditors holding two hundred dollars of claims may apply to the court, and the court may appoint a receiver who shall then administer the estate pursuant to the provisions of Chapter 128.

The Act provides that the same proceedings may be taken by the debtor for a discharge as if he had made a voluntary assignment. This is an entirely different discharge provision than was held to be suspended in the Tarnowski Case, 191 Wis., 279. It is this chapter, construed by the Supreme Court

to be a valid enactment, which it is claimed effectively took away the right of garnishment. It is this chapter which affords the remedy to which the state court limited the plaintiff. It is this chapter which the state court held to be valid in toto.

IV.

CASES RELIED UPON TO SUSTAIN THE JURISDICTION OF THE COURT

The first pleading filed in this case, namely, the garnishee affidavit, squarely raised the federal question that Chapter 128 was suspended by the National Bankruptcy Act. This question was squarely met and passed upon by the trial court. After referring to the holding of this court in *International Shoe Co., vs. Pinkus*, 278 U. S. 261, in which case the Arkansas law was held suspended, the trial court said:

> " . . . So I fail to see a substantial difference between the statutes of Arkansas and the provisions of Chapter 128 of this state, or this common law assignment, if we choose to so regard it. The difference is in words only. In either case it is an invasion of the National Bankruptcy Act and void in toto. The position of the garnishee defendants is a mere play upon words, a legal beating of the devil around the bush." (R. 60).

He said further:

> "Tested by the inevitable result of these assignment proceedings if permitted to proceed, the property of this corporation will be disposed of and distributed among such creditors as have filed their claims and the corporation be *discharged of its debts*, just as effectually as though an order of the court were made barring all creditors who have not so filed.
>
> It is simply an ingenious way of going through bankruptcy under the guise of a common law assignment. There remains, after this trust is complied with, no property of the Boyd Company and no personal liability

on the part of the stockholders. The corporation is discharged of its debts and its creditors are barred of any remedy." (R. 57).

The Supreme Court devoted its opinion almost entirely to the effect of the National Bankruptcy Act on state assignment laws and concluded that Chapter 334, Laws of 1897, constituted a valid enactment (R. 92). It concluded further that a discharge provision is not an essential of a bankruptcy law, and that a state law which provides for the distribution of the assets of an insolvent debtor, but which has no discharge provision, is not suspended by the Bankruptcy Act.

From the foregoing it is apparent that the sole question at issue both in the trial court and in the Supreme Court is as to whether the state law regulating assignments for the benefit of creditors is suspended by the National Bankruptcy Act. There was thus drawn in question the validity of a state statute on the grounds of its being repugnant to the laws of the United States, and the decision was in favor of the validity of the state statute.

Under Section 237, Judicial Code, the jurisdiction seems clear, and the following cases support this contention:

International Shoe Co. v. *Pinkus,* 278 U. S. 261.
Boese v. *King,* 108 U. S. 379.
Bryant v. *Zimmerman,* BGR *U. S.* FC.
New Orleans & N. E. R. R. Co. v. *Scarlet,* 249 U. S. 528.
Hammond v. *Whittredge,* 204 U. S. 538.

It is respectfully submitted that this court has jurisdiction and that such jurisdiction should be accordingly sustained.

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APPENDIX A

Chapter 334, Laws of 1897, was entitled,

> **"An Act to amend Chapter 80 of the revised statutes of the State of Wisconsin for the year 1878 entitled, 'Of Voluntary Assignments.'"**

The previsions of Chapter 334 are here set forth as they appear in the Wisconsin Statutes for 1931, and remain unchanged except as the sections are renumbered:

> **"128.06 . . . But no assignment shall be void because of any defect, informality or mistake therein or in the bond, inventory or list of creditors accompanying the same; and the court or judge may direct the amendment of the assignment or of any other such paper to effect the intention of the assignor or assignee, and any such amendment shall relate back to the time of the execution of the paper to which it is made. No mistake in filing a copy instead of an original or any like mistake or inadvertent failure to comply with the provisions of this chapter shall avoid the assignment. No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of the insolvency of any debtor, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void; but in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all his creditors under the direction of the court by the assignee or by any receiver of said property and estate appointed as hereinafter provided.**
>
> **128.07 . . . Whenever the property of an insolvent debtor is attached or levied upon by virtue of any process in favor of a creditor or a garnishment is made against such a debtor he may, within ten days thereafter, make an assignment of all his property and estate, not exempt, for the equal benefit of all his creditors, whereupon all such attachments, levies, garnishments or other**

process shall be dissolved and the property attached or levied upon shall be turned over to such assignee or receiver.

128.08 . . . When any debtor, being insolvent, shall confess judgment or do any act or make any conveyance whereby one or more of his creditors shall obtain a preference over any other of his creditors or shall omit or do any act which he might lawfully do to prevent any of his creditors from obtaining preference over his other creditors, contrary to the intent of this chapter, or if he shall not, within ten days after any levy by attachment, execution or garnishment made against him, make an assignment of all his property, as provided in the next foregoing section, or within such time in good faith institute proceedings to vacate the attachment, execution or garnishment, or secure a release of such levy or defend against the said levy, then, or within thirty days thereafter, any two or more of his creditors holding and owning debts or claims of not less than two hundred dollars in the aggregate may make a petition to the circuit court or a judge thereof in the county or circuit where such debtor resides, if a resident of this state, and if not, in any county thereof, setting forth therein such matters and facts as may be pertinent, and after notice given in such manner as the court or judge may direct to the debtor and creditors sought to be preferred or to their attorney of record, of the time and place of hearing, the court in term time or a judge in vacation shall proceed summarily upon such petition to hear the parties and receive such evidence as may be proper, and if it shall appear to the court or judge that the debtor is insolvent and has given a preference to any of his creditors over other of his creditors or any of them, or has refused or neglected to make an assignment of his property as hereinbefore provided, the court or judge shall appoint a receiver who shall take possession of all the debtor's property, evidences of property or indebtedness, books, papers, debts, choses in action and estate of every kind, including property attached or levied upon or garnished in the manner and subject to the limitations herein provided and of all property conveyed in violation of the

provisions of this chapter, and have charge and control of the same, and of all debts or property garnished, except property exempt by law, and convert the same into money and distribute the same pro rata among the creditors having valid claims due or to become due who shall prove their claims within such time and manner as the court or judge shall direct; and the court or judge shall order the debtor to file a correct inventory of his assets and a list of his creditors as provided in section 128.13; such receiver shall be appointed and all proceedings shall be had under these statutes relating to receivers, and the court or judge may order or direct such debtor to do or refrain from doing whatsoever is necessary and proper to carry this chapter into effect. The provisions of this chapter shall not apply to any payment or satisfaction, in whole or in part, of a past-due debt made in the usual course of business without any intent on the part of the creditor to evade the same. The same proceedings may be taken and with like effect under the provisions of this section by such insolvent debtor for a discharge from his indebtedness as if said debtor had made a voluntary assignment under this chapter.

128.09 . . . An insolvent person, within the meaning of this chapter, is one whose nonexempt property is insufficient in amount, at a fair valuation, to pay his debts; and when insolvency is to be inquired into, with reference to this chapter, it shall be determined as of the date of the making or attempting to make an assignment or of the giving or attempting to give any preference prohibited hereby, the issuing of an execution or attachment or the institution of garnishment proceedings against the debtor's property.

128.10 . . . In all actions authorized by this chapter appropriate provisional remedies may be had and final relief administered to the equal distribution of all assets recovered among the creditors of the debtor, and the court may make such orders for the payment of costs and expenses as may be just. An action or proceeding authorized herein for the benefit of all creditors may be taken by a creditor although his demand is not due at the commencement thereof."

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM—1932

No. 171

MRS. J. H. POBRESLO,

Plaintiff and Appellant,

vs.

JOSEPH M. BOYD COMPANY,

Defendant,

CLARENCE E. KARN, L. D. ATKINSON
LEO T. CROWLEY and EDWARD J. SAMP,

Garnishee Defendants and Respondents.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

This is an appeal by Mrs. J. H. Pobreslo from a judgment of the Supreme Court of the State of Wisconsin entered on the 10th day of May, 1932, based upon an opinion of that Court rendered and filed on the same day reversing the judgment of the trial court.

General Statement of Federal Question Involved.

The case involves the question whether, during the existence of the National Bankruptcy Act, a general assignment for the benefit of creditors under Chapter 128, Wisconsin Statutes, was effective to withdraw the property of the assignor from the reach of a garnishment in an action against the assignor by appellant, a non-assenting creditor who was unable to invoke the Bankruptcy Act. The trial court sustained appellant's contention that the state statute was suspended, the assignment void, and the property in the hands of assignees subject to the garnishment. The Supreme Court, reversing the trial court, held the contrary, its opinion being reported in 242 N. W. 725.

It is appellant's claim that the state statute is wholly suspended by the Bankruptcy Act because it sets up a complete statutory system of administering and distributing insolvent estates, enforcement of which would be destructive of the uniformity which is the primary object of the federal bankruptcy legislation. If the entire statute is not suspended, at least Chapter 334, Laws of 1897, relied upon by the State Court to defeat appellant's claim, is suspended, since it embodies all the elements of an involuntary bankruptcy law.

Grounds of the Federal Jurisdiction.

This question was fully discussed in Appellant's Brief on Jurisdiction heretofore submitted, and will not be repeated here.

The Facts.

The Joseph M. Boyd Company, an insolvent Wisconsin corporation, made a statutory assignment for creditors, but failed to comply with mandatory requirements of the statute.

The corporation was engaged in the business of selling securities and loaning money to the public (R. 4). On March 23, 1931, being then insolvent (R. 4), it assigned all of its property for the benefit of creditors under (but not in substantial compliance with) the provisions of Chapter 128, Wisconsin Statutes (R. 5). The assignees on the same day took possession of all of the property of the Company, before furnishing any bond whatsoever (R. 5). At no time have they furnished a bond in a sum equal to the then assets of the Company, as required by the statute (R. 5). Subsequently they filed a bond in an amount far below the value of the assets of the Company (R. 5). The assignees were expressly authorized by the assignment to incur expenses to operate the business if in their judgment further operation was desirable (R. 16). The assignment conveyed the property to the assignees:

> ". . . to the end that the debts and demands of the corporation may be paid and discharged." (R. 16).

The Circuit Court for Dane County assumed jurisdiction under the statute to distribute the estate among all creditors.

At the same time the assignment was executed a petition was filed in the Circuit Court for Dane County, requesting the court to assume full jurisdiction and supervision over the assignment and the distribution to be made thereunder. On the same day the court, by its order, assumed jurisdiction under the provisions of Chapter 128 (R. 14), and ordered the publication of notices to creditors in accordance with Section 128.14, Wisconsin Statutes, and the filing of proof of claims in accordance with the provisions of Section 128.15, Wiscon-

sin Statutes (R. 14, 15). The garnishee affidavit in the present action asserts, and it is admitted:

> ". . . that the said insolvent estate is now being administered and its assets are being distributed by the said trustees under the direction of the court in accordance with the provisions of said Chapter 128, Wisconsin Statutes of 1929, and will continue to be so distributed." (R. 7)

Distribution under the Wisconsin statute is less favorable to general creditors than under the Bankruptcy Act.

The garnishee affidavit alleges, and it is admitted:

> "That the said differences between Chapter 128, Wisconsin Statutes, 1929, and the Bankruptcy Act are such as to cause a distribution under the said Chapter 128, Wisconsin Statutes, 1929, which is less favorable to general creditors, of plaintiff's standing, than the distribution provided for by the Federal Bankruptcy Act." (R. 7)

These differences and conflicts between the two laws are set forth in detail in a subsequent portion of this brief. (p. 42.)

The question arises before this court exactly as it was presented in International Shoe Co. vs. Pinkus, 278 U. S. 261.

At the time the Boyd Company made its assignment, appellant had a cause of action against it on contract. On July 30, 1931, just a little more than four months after the assignment had been executed she commenced an action on this contract against the assignor Company. At the same time she commenced a separate garnishment action against the three assignees named in the assignment, on the theory that the assignment was void. Appellant asserted, and she now asserts, that if the assignment be regarded as a common law assignment it was void on its face because of certain presumptively fraudulent provisions contained there-

in, and if regarded as a statutory assignment, which, in fact, it was, then the proceedings in connection with the assignment had no validity because the statute in question was wholly suspended during the existence of the National Bankruptcy Act.

It was appellant's claim that she was authorized to garnish under the express provisions of Section 267.17, Wisconsin Statutes, which makes a garnishee liable for any property or credits held by conveyances void as to creditors.

Judgment was entered in appellant's favor on her claim against the Boyd Company, and thereafter judgment was entered directing the assignees to pay the appellant's judgment out of the assets in their hands.

The garnishee affidavit alleges, and it is admitted, that the Boyd Company was subject to the Bankruptcy Act, but that the appellant, being a single creditor, was unable to invoke that act, although a diligent effort was made to that end (R. 8). It is also admitted that the appellant has not filed a claim in the state assignment proceedings, and in that proceedings:

> "Preference will be given to creditors who have filed claims therein and plaintiff will be debarred a dividend." (R. 8)

Appellant claims, therefore, that being a single, non-assenting creditor like the plaintiff in the *Pinkus* case, she can take advantage of the invalidity resulting from the conflict between the state law and the National Bankruptcy Act, even though bankruptcy proceedings were not in fact instituted.

Subsequent to the commencement of this action the Boyd Company attempted to amend the assignment to provide for distribution in accordance with the terms of the Bankruptcy Act.

The garnishee defendants did not answer within the twenty day period required by law, the time for answering having been extended with the appellant's consent. In the interval

between the service of the garnishee summons and service of the answer, it appears to have been thought necessary, or at least advisable, to amend the assignment in order to meet the criticism that distribution under the state law conflicted with distribution under the federal law. The terms of the amendment are set forth in pages 19 to 23 of the Record and indicate an attempt to incorporate parts of the Bankruptcy Act into this assignment. While the Supreme Court of Wisconsin appears to have properly denied any effect to the amendment, it at least discloses an attempt to provide for a distribution in the state court in accordance with the terms of the National Bankruptcy Act (R. 21).

The attempted assignment gave the assignees further authority to conduct and continue the business (R. 22), and to postpone the sale and collection of the property for such time as was consistent with reducing the same to money until the same could be wisely done (R. 22). The attempted amendment limits the liability of the trustees to cases of loss resulting through their own wilful default (R. 23).

The Wisconsin Statutes on Voluntary Assignments (Chapter 128 Statutes) Underwent Three Stages of Development. Until 1889 the Chapter was Largely Regulatory of Voluntary Assignments. In 1889 Complete Provisions for Discharge Were Added. In 1897 a Complete Scheme of Involuntary Proceedings was Added to the Law.

Early statutory provisions were merely regulatory of common law assignments.

The statutory provisions material upon this appeal are found in Chapter 128, Wisconsin Statutes of 1929, which was in force when the assignment was made.

Since 1878 and up until 1889 the statutes were largely regulatory of common law assignments. The sections of the statute which come under this classification are Sections

128.01 to 128.06, a part of 128.06, and Sections 128.11 to 128.18 inclusive.

Section 128.01 provides that the Circuit Judge shall have supervision of the proceedings in voluntary assignments. This section has been in the statutes at least since 1878.

Section 128.02 provides that levies on executions, sales, mortgages and liens made or given within sixty days prior to an assignment shall be void under certain conditions and also invalidates preferences given within six months. This section dates back to 1883.

Section 128.03 deals with the powers of the assignee and authorizes him to proceed to set aside preferences, and upon his failure to do so gives this right to creditors, under certain conditions. This section dates back to 1882.

Section 128.04 provides that the assignee in an action to set aside fraudulent conveyances shall stand in the shoes of creditors. This section dates back to 1901.

Section 128.05 provides for the conditions under which a creditor may bring an action to set aside a fraudulent conveyance if the assignee fails to do so. This section dates back to 1901.

Section 128.06, except the last fifteen lines thereof, has been in the statutes since 1878. It provides that all voluntary assignments shall be void as to creditors unless the assignee, before taking possession of the property, shall give a bond in the amount and in the manner provided by this section.

Sections 128.11 to 128.18 have been in the statutes at least since 1878. Section 128.11 specifies the place where the bond shall be filed and authorizes the court to require assignees to furnish new or additional bonds.

Section 128.12 indicates the manner in which the assignee shall indicate his assent to the assignment.

Section 128.13 requires the assignor to make and file with the clerk of the court an inventory of his assets.

Section 128.14 requires the assignee, within twenty-two days after the assignment, to give notice to creditors and requires the creditors to file their claims within three months on pain of being debarred a dividend.

Section 128.15 provides for the manner in which objections to claims shall be heard and disposed of by the court.

Section 128.16 provides that creditors who do not file claims within the time limited shall not participate in any dividend paid before the claim is filed. Interest is computable to the time of the dividend. Before paying any dividend the assignee shall pay all taxes assessed upon the property and shall pay the compensation due all laborers, servants and employes for labor or services performed for the assignor within the six months next preceding the making of the assignment, the claims for which shall be paid by him next after payment of unpaid taxes and assessments, debts due the United States or this state, the expenses of the assignment, and the execution of the trust.

Section 128.17 provides for the manner in which the assignee shall settle his accounts and for their approval or disapproval by the court.

Section 128.18 authorizes the Circuit Judge to remove an assignee upon the application of a majority of the creditors and to appoint a new assignee.

Discharge provision enacted in 1889.

Sections 128.19 to 128.29 inclusive came into the statutes in 1889 by Chapter 385 of the Laws of 1889, and provide a complete procedure whereby an assignor who has made a voluntary assignment and who complies with the statute may procure his discharge. These sections relating to discharge

originally constituted Chapter 80 (a) of the Statutes, and by revision of 1898 were embodied in the same chapter as that containing the foregoing sections dealing with assignments, which was then Chapter 80; and they have been held separable by reason of their independent origin (see page 14 below).

Chapter 334, Laws of 1897, which is relied upon to defeat plaintiff's claim, contains all the elements of an involuntary bankruptcy law, including discharge.

The last fifteen lines of Section 128.06, together with Sections 128.07 to 128.10, inclusive, came into the statutes by an amendment enacted in 1897 and known as Chapter 334, Laws of 1897, which chapter was entitled, "An Act to Amend Chapter 80 of the Revised Statutes of the State of Wisconsin for the Year 1878 entitled, 'Of Voluntary Assignments.'" Former Chapter 80 has now been renumbered Chapter 128. This Act is set forth in full as Appendix A, in appellant's brief on jurisdiction.

An analysis of the provisions of Chapter 334, Laws of 1897, discloses that in itself it contains every element of a bankruptcy law. It penalizes a debtor who, like the Boyd Company, makes an assignment not in accordance with the state law, or who does other acts which are the equivalent of acts of bankruptcy, by providing that the doing of such acts shall operate to give the state court jurisdiction to distribute the entire assets of the insolvent debtor in accordance with the statutory method of distribution, in entire disregard of the wishes of the assignor. Validity of preferences and of claims is determined in the state court. There is an express provision in the chapter for the discharge of the debtor. The chapter commences as follows:

> "But no assignment shall be void because of any defect, informality, or mistake therein or in the bond, inventory or list of creditors accompanying the same; and the court or judge may direct the amendment of the

assignment or of any other such paper to effect the intention of the assignor or assignee, and any such amendment shall relate back to the time of the execution of the paper to which it is made. No mistake in filing a copy instead of an original or any like mistake or inadvertent failure to comply with the provisions of this chapter shall avoid the assignment. No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of the insolvency of any debtor, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void; **but in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all his creditors under the direction of the court by the assignee or by any receiver of said property and estate appointed as hereinafter provided."** (Now part of section 128.06.)

Section 128.07 provides that when the property of an insolvent debtor is attached or levied upon, he may within ten days thereafter make an assignment, whereupon the attachment shall be dissolved and the property turned over to the assignee.

Section 128.08 provides that if an insolvent debtor shall confess judgment or give any creditor a preference or omit to do any act necessary to prevent creditors from obtaining a preference, or shall fail within ten days after a levy or attachment to make a voluntary assignment, then **any two or more creditors holding claims of not less than $200 may petition the court, and if it shall appear that the debtor is insolvent and has given a preference, or has refused to make an assignment, the court shall appoint a receiver who shall take possession of all of the debtor's property and distribute it pro-rata among his creditors.**

The section further provides that in such event creditors shall file and prove their claims; that the debtor shall file an

inventory, as provided in Section 128.13, and concludes as follows:

"The same proceedings may be taken and with like effect under the provisions of this section by such insolvent debtor for a **discharge** from his indebtedness as if said debtor had made a voluntary assignment under this chapter."

Section 128.09 defines insolvency.

Section 128.10 authorizes provisional remedies in all actions brought under this Chapter, and authorizes the court to make orders for payment of costs and expenses.

Because the Supreme Court of Wisconsin, in the decision from which this appeal is taken, makes reference to Chapter 334, Laws of 1897, we reiterate that the last five sections of the statute hereinabove referred to (last fifteen lines of Section 128.06—128.10) constitute what is known as Chapter 334, Laws of 1897.

The state legislature in 1921 and in 1923 dealt with the entire Chapter 128 as a unit and considered it suspended by the Bankruptcy Act.

The only other legislative changes were the following:

By Section 35, Chapter 590 of the Laws of 1921, we find that Chapter 80 of the Statutes of 1919 (which then embodied all of the sections hereinabove referred to) was:

> ". . . withdrawn from the statutes and shall not be hereafter printed in the statutes so long as the National Bankruptcy Act remains in force."

This provision was a part of the Revisor's Bill prepared under the direction of Revisor Charles H. Crownhart, later a justice of the Wisconsin Supreme Court; and the bill, when adopted by the legislature, contained a note by the Revisor to the effect that:

> "Chapter 80 is the Voluntary Assignment Act and is suspended by the Federal Bankruptcy Act."

Two years later Chapter 132 of the Laws of 1923 provided that Chapter 80 should be restored as a part of the statutes and should be thereafter printed as such.

It is our information, derived from the Legislative Reference Library, that the Library prepared this Act at the request of Assemblyman Timmerman, who desired that it be printed in the statutes in order that certain provisions in the chapter in respect to priorities of claims due the state might be availed of in bankruptcy proceedings under the theory that the bankruptcy court would recognize state provisions in respect to exemptions and priorities. It is significant that the state legislature **did not treat any portions of the statute as severable,** but treated it as a unit.

The Wisconsin Decisions Prior to This Case Construed Chapter 128 as Containing all the Essential Features of a Bankruptcy Law.

Proceedings thereunder are entirely statutory and the assignment is void if the statute is not complied with.

The following decisions of the Supreme Court of Wisconsin, which are not intended to be all-inclusive, indicate the general construction which that court has placed upon the provisions of Chapter 128:

In *Klauber* v. *Charlton,* 47 Wis. 564, 569, the court said:

> "Previous to the enactment of this statute, it was competent for a debtor to make an assignment of his property to any person of his choice for the benefit of his creditors, without requiring such assignee to give any security for the faithful performance of the trust reposed in him. * * *
>
> The statute above cited was passed for the purpose of compelling assignees to give security for the faithful performance of their duties as such, and thereby afford some assurance to the creditors that the property assigned would be faithfully administered for their benefit; and it

declared all assignments **absolutely void** which were not made to some resident of this state, and where the assignee did not give the bond required by such act."

In *Wadleigh* v. *Merkle,* 57 Wis. 517, 518, the court said that under this chapter:

". . . there can be no assignment which shall have any efficacy to withdraw the property of the assignor from the reach of its creditors unless the provisions of said sections are complied with on the part of the assignor and assignee; and until the assignee shall have given his bond and signified his assent to take upon himself the discharge of the trusts mentioned in the assignment, the assignment is void."

Distribution thereunder is statutory, not voluntary.

In *Duryea* v. *Muse,* 117 Wis. 399, the court, referring to the chapter on voluntary assignments, said:

"Such bankrupt features relate to the **distribution** of the estate of the insolvent debtor and his discharge from his debts."

In *re Voluntary Assignment of the Milwaukee Sheep & Wool Co.,* 186 Wis. 320, the court said:

"The entire procedure in an assignment is largely determined by the statute and in order to be a valid assignment the statutory requirements must be complied with."

The court said further:

"By way of reiteration, let it be said that the statutes on voluntary assignments are designed **for the benefit of general, unsecured creditors.** It was such object that the legislature had in mind when it enacted Sec. 1701 (now 128.17), above quoted."

The statutory plan of distribution and discharge embodies the primary characteristics of a bankruptcy law.

In *Holton* v. *Burton*, 78 Wis. 321, the court, after pointing out the various amendments which had been made to Chapter 80 of the Statutes of 1878, including the amendment in respect to discharge, said:

> "Ch. 80, R. S. 1878, as amended by the laws above cited, is now an insolvent law under which the insolvent debtor may be discharged from his debts, at least as to the creditors residing in this state."

The court pointed out that under the amendments referred to, preferences given within sixty days were void, that the assignee was given the powers of a creditor to set aside fraudulent conveyances, and that provision was made for discharge.

In *Binder* v. *McDonald*, 106 Wis. 332, and in *Segnitz* v. *Garden City Bank & Trust Co.*, 107 Wis. 171, the court pointed out that it was the addition of Chapter 80(a), dealing with discharges, which led the court to speak of our whole system relating to voluntary assignments as an insolvent law. In the *Segnitz* case the court said, however:

> "It was, in legal effect, tacking a bankrupt law to the assignment law; and inasmuch as the **distribution** of the estate depends, not upon the will of the assignor, but upon the positive requirement of the law-making power, we can see no escape from the conclusion that in so far it becomes **statutory,** and **not voluntary."**

The discharge provisions enacted in 1889 have been held suspended by the Bankruptcy Act.

In *In re Voluntary Assignment of Tarnowski*, 191 Wis. 279, the court held that Chapter 80 of the Revised Statutes of 1878, which dealt with voluntary assignments (see p. 6 above) was severable from Chapter 80 (a) which dealt with

discharges, and that only Chapter 80 (a) was suspended by the Bankruptcy Act.

Although the court points out:

> ". . . that the statutory provisions under which the estate was administered **up to the point of distribution** are mere regulations of voluntary assignments for the benefit of creditors;"

and in spite of the fact that Chapter 80 prescribed the manner of distribution among general creditors, yet because the discharge provisions were found in Chapter 80 (a), Chapter 80 was held not an insolvent or bankruptcy law.

In other words, the case holds that even though the state law fully covers the matter of **distribution** of the estate among general creditors, yet, if the discharge provision can be detached therefrom it is not a bankruptcy law and is not suspended by the National Bankruptcy Act.

In case of a void assignment the estate is administered wholly by the court under Chapter 334, Laws of 1897, regardless of the wishes of the insolvent or his creditors.

In *Mayfield Woolen Mills* v. *Goodrich & Martineau Co.*, 189 Wis. 406, an assignment was made by the Goodrich Company. It claimed to be solvent and there was no finding to the contrary. There was no contention made that the assignment was affected by the Bankruptcy Act.

The assignees filed no bond. It was held that as the law stood prior to the enactment of Chapter 334, Laws of 1897, such failure would have rendered the assignment void and left the property subject to garnishment. It was held, however, that Chapter 334, Laws of 1897, covered such a case by its provision to the effect that if an assignment was for any reason void it should be administered under the direction of the court by the assignee or by a receiver appointed by the court under the provisions of Chapter 334, Laws of 1897, and

that the only remedy that a creditor had was to come into the assignment proceedings in the state court.

The case in effect holds that the only remedy left to a creditor is to participate in a proceeding in the state court, which proceeding is one where the state court assumes jurisdiction over the assignment, and, regardless of the wishes of the assignor, proceeds to appoint an assignee or receiver who administers the entire estate of the insolvent for the benefit of general unsecured creditors.

The state court has said that a discharge provision is an absolute essential of a bankruptcy law.

In *Hazelwood* v. *Olinger Bldg. Dept. Stores*, 205 Wis. 85, the court took occasion by **dictum** to point out that since the provisions of the Wisconsin Statute enacted in 1889 relative to discharge had been held severable and suspended in the *Tarnowski* case (see p. 14 above), and since the discharge was the very essence of a bankruptcy law, a statute which did not provide for discharge could not be held to be suspended by the Bankruptcy Act.

Summary of Wisconsin decisions prior to this case.

It is apparent from the foregoing statutory provisions and the decisions of the state court that an assignment, to have any potency, must be made in accordance with the terms of the statute; that distribution under an assignment is wholly statutory and independent of the wishes of the insolvent; that the entire estate of the insolvent is administered for the benefit of general, unsecured creditors; that the whole procedure is similar to, although in some points conflicting with, the procedure in bankruptcy; and that the state statute has every element of a bankruptcy law, including the discharge provision, although this provision as enacted in 1889 has already been held to be suspended.

Furthermore, the statute obviously is more than a voluntary assignment law. It contains every element of an involuntary bankruptcy law in that it provides detailed machinery whereby the court assumes jurisdiction over the estate of an insolvent who makes a void assignment or refuses to make any assignment, or who gives or suffers a preference, and administers this estate for the benefit of his general creditors, wholly regardless of the will of the assignor.

The Decisions of the Wisconsin Courts in This Case.

The trial court held the assignment void whether considered as a common law assignment or as made under the statute, and held that all of Chapter 128 was suspended because in conflict with the National Bankruptcy Act.

The decision of the trial court is printed at page 25 of the Record. That court held, in effect, that if this assignment be considered as a common law assignment and independently of the National Bankruptcy Act, it was void because:

(1) It limited the liability of the trustees.

(2) It authorized the sale of assets upon credit.

(3) It authorized the continuing of business and the incurring of expenses and mortgaging of property (R. 32).

These provisions, in the opinion of the trial court, on their face tended to hinder and delay creditors and made the entire assignment void.

The trial court held further that Chapter 128, Wisconsin Statutes, is a bankruptcy law because the distribution thereunder is statutory and not voluntary, and because distribution, and not discharge, is the principal element of a bankruptcy law; that the existence of the Bankruptcy Act suspended the operation of Chapter 128; that the debtor's assignment was therefore void; and that accordingly the appellant was free to garnish.

The supreme court held this was not a common law assignment; that the assignment was made under Chapter 128; that since the discharge provisions enacted in 1889 are suspended, Chapter 128 is valid; that this assignment is void for non-compliance with Chapter 128; that being void as a voluntary assignment it will be administered by the court under the provisions of Chapter 334, Laws of 1897, which law also takes away the remedy of garnishment; and that Chapter 334, Laws of 1897, is valid in toto.

The decision of the Supreme Court of the State, reversing the judgment of the trial court, is reported in Vol. 242 N. W. 725, and is printed at page 37 of the Record. That Court held that the assignment was intended, not as a common law assignment, but as a statutory assignment for creditors generally. It did not disturb the trial court's finding that, as a common law assignment, the instrument was void. The Supreme Court agreed that under the provisions of the statute the assignment was void for non-compliance with the provisions relative to the bond and other provisions. It held, however, that since the assignment was void under the statute, Chapter 334, Laws of 1897, which provides that the court shall administer void assignments (see page 10 above), came into operation; that creditors were relegated to the provisions of that chapter for their remedy and could not garnish; and that the remedy so afforded is to participate in the state court proceedings held pursuant to said Chapter 334.

The court expressly ruled that Chapter 334, Laws of 1897, which sets up this involuntary proceeding in which the insolvent estate is wholly administered for creditors generally and which by its terms expressly provides for discharge, is **"a valid enactment."** It was held valid in its entirety, the discharge provision therein not having been held separable nor suspended. The court also expressly held that state assignment laws which contain every element of a bankruptcy law except discharge are not suspended by the Bankruptcy Act, or in other words that discharge is the *sine qua non* of a Bankruptcy Act.

Specification of Errors.

The State court erred in:

(3) Holding that a state statute, such as Chapter 128 Wisconsin Statutes, which provides for the distribution of the assets of an insolvent debtor among his creditors is not suspended by the Bankruptcy Act regardless of whether it contains a valid provision for discharge.

(2) Failing to hold that Chapter 334 Laws of 1897 of Wisconsin is not in effect an involuntary bankruptcy system with provision for discharge and is wholly suspended by the national bankruptcy act.

In determining the effect of the Bankruptcy Act upon the state law this court will determine the question of conflict for itself and is not bound by the state decisions.

There is here involved a Federal question, and as far as the plaintiff's rights are secured under the Federal Statutes and the Constitution, the decision of the state court as to the validity of the state statute is not binding on this court. In determining whether the state law sets up a bankruptcy system, this court will look beyond the name or label that the state court affixes to the statute, and will consider independently the provisions of the legislation and determine for itself whether it is a bankruptcy law which invades the field occupied by the National Bankruptcy Act.

Clyde v. *Gilchrist*, 262 U. S. 94, 97.
King Mfg. Co. v. *Augusta*, 277 U. S. 100, 114.
Choctaw & Gulf R. R. Co. v. *Harrison*, 235 U. S. 292.

"It may be remarked, however, that the validity of the assignment is not questioned under the state statute, and its status depends upon a construction of the provisions

provisions of the statute the assignment was void for non-compliance with the provisions relative to the bond and other provisions. It held, however, that since the assignment was void under the statute, Chapter 334, Laws of 1897, which provides that the court shall administer void assignments (see page 10 above), came into operation; that creditors were relegated to the provisions of that chapter for their remedy and could not garnish; and that the remedy so afforded is to participate in the state court proceedings held pursuant to said Chapter 334.

The court expressly ruled that Chapter 334, Laws of 1897, which sets up this involuntary proceeding in which the insolvent estate is wholly administered for creditors generally and which by its terms expressly provides for discharge, is **"a valid enactment."** It was held valid in its entirety, the discharge provision therein not having been held separable nor suspended. The court also expressly held that state assignment laws which contain every element of a bankruptcy law except discharge are not suspended by the Bankruptcy Act, or in other words that discharge is the *sine qua non* of a Bankruptcy Act.

Assignment of Errors

The assignment of errors is set forth at page 1 of the Record and will not be repeated here.

I.

A STATE LAW WHICH SETS UP A COMPREHENSIVE SYSTEM OF ADMINISTERING AND DISTRIBUTING ESTATES OF INSOLVENTS AMONG GENERAL CREDITORS IS A BANKRUPTCY LAW AND IS SUSPENDED BY THE FEDERAL ACT EVEN THOUGH THE MATTER CANNOT PROCEED TO A DISCHARGE OF THE DEBTOR.

In determining the effect of the Bankruptcy Act upon the state law this court will determine the question of conflict for itself and is not bound by the state decisions.

There is here involved a Federal question, and as far as the plaintiff's rights are secured under the Federal Statutes and the Constitution, the decision of the state court as to the validity of the state statute is not binding on this court. In determining whether the state law sets up a bankruptcy system, this court will look beyond the name or label that the state court affixes to the statute, and will consider independently the provisions of the legislation and determine for itself whether it is a bankruptcy law which invades the field occupied by the National Bankruptcy Act.

> *Clyde* v. *Gilchrist*, 262 U. S. 94, 97.
> *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 114.
> *Choctaw & Gulf R. R. Co.* v. *Harrison*, 235 U. S. 292.

> "It may be remarked, however, that the validity of the assignment is not questioned under the state statute, and its status depends upon a construction of the provisions

of the national bankruptcy act in that regard, and the inquiry is not one which is governed by any rule of decision in the state. * * * but that question, when presented, will call for independent judgment, in the light of all the authorities."

In re Plotke, 104 Fed. 964, 968. (C. C. A. 7th Cir.)

The Wisconsin law should be analyzed and classified in the light of the fact that when it was enacted there was no Bankruptcy Act and hence no conflict. It was clearly a bankruptcy law then, and nothing has happened since to change its character.

In determining whether the Wisconsin Statutes set up a bankruptcy system, they should be viewed in the light of the surrounding circumstances at the time of their enactment, in order to determine the legislative intent. The entire Wisconsin statutory system was complete prior to 1898, the date of the present Bankruptcy Act.

When the Wisconsin Legislature enacted the chapter on discharge in 1889 (see p. 8 above), and subsequently added the involuntary proceedings with its additional discharge provision in 1897 (see p. 9 above), there was no National Bankruptcy Act. It should require no citation of authority for the assertion that the Wisconsin statutes, as they existed in 1897, comprised a complete state bankruptcy system. They had every feature of a bankruptcy law.

The legislature has made no material changes in the state law since 1897. If it was a bankruptcy law in 1897, why is it not a bankruptcy law today? The only answer of the state court is that certain of the discharge provisions in the law have since been judicially declared to be suspended. We submit that the suspension of those discharge provisions is not sufficient to change what was admittedly a bankruptcy law into one which does not relate to the "subject of bankruptcies."

The early history of bankruptcy legislation demonstrates that discharge is not a necessary part of a bankruptcy law.

We are not unmindful of the fact that bankruptcy has come to be commonly regarded as a measure designed to free debtors from their debts. This results, undoubtedly, from the fact that of late years it has been more commonly invoked by debtors than by creditors. But the use made of the law does not determine its fundamental nature or purpose, and these can best be determined by recurrence to the early history of bankruptcy legislation.

The history of such legislation is exhaustively reviewed by Remington in the introduction to his work on *Bankruptcy*, 3rd ed. His conclusions are stated thus:

> "To gain a proper conception of bankruptcy law and of its place in jurisprudence it is well first to exclude from the idea certain popular misconceptions of its origin, scope and function. The bankruptcy law is popularly conceived to be a law devised mainly for releasing debtors from the bondage of hopeless indebtedness. This is undoubtedly the first idea that springs to mind when bankruptcy law is mentioned. But it is a wholly inadequate idea. **Release from debts is not necessarily a part of the bankruptcy law at all, and from the standpoint of history is a mere incident to its original object.** * * * But this release from debts is, as above noted, merely an incident of the later development of bankruptcy law, not its original object." (p. 1)

The early Roman law impounded the debtor's property, provided for its equitable distribution among creditors, imposed penalties for fraud on the debtor's part, but contained no provision for discharge.

Radin, *Handbook of Roman Law*, p. 314.

Bankruptcy legislation in England bears out this view. The first English bankruptcy act contained no provision for discharge (34 Henry VIII, 1542); in fact it contained an ex-

press provision that there should be no discharge. Queen Anne's Act of 1705 contained the first provision for discharge, although discharge was wholly conditional upon the consent of a high proportion of the creditors. The state of the law on bankruptcy in England at the time of the Revolution is set forth in Blackstone's Commentaries, Book II, Chapter XXXI. A very minor portion of the chapter deals with discharge, and the discharge was conditional upon consent of four parts in five in number and value of the creditors.

The meaning of the constitutional grant of power given to Congress under Article I, Section 8, of the Constitution must be viewed in the light of English bankruptcy history.

> "We take our bankruptcy system from England and we naturally assume that the fundamental principles upon which it was administered were adopted by us when we copied the system, somewhat as the established construction of the law goes with the words where they are copied by another state."
>
> *Sexton* v. *Dreyfus,* 219 U. S. 339, at 344.

And so we find the prevalent ideas of the English system embodied in the first national bankruptcy law, which was passed in 1800 during the administration of John Adams. It was essentially a law against debtors. It could not be invoked by the debtor. It applied only to traders, merchants and brokers. It gave no absolute right to discharge. Discharge could not be had without the written consent of two-thirds in number and value of all creditors. 2 U. S. Stat. at L. 19.

If this law had, like the early English acts, contained no provision for discharge, could it be said that it was not a bankruptcy law and was not within the grant of power to Congress? In response to this question Chief Justice Marshall said:

> "* * * But if an act of Congress should discharge the person of the bankrupt, and leave his future acquisitions

liable to his creditors, we should feel much hesitation in saying this was an insolvent, and not a bankrupt act, and, therefore, unconstitutional."

Sturges v. *Crowninshield,* 4 Wheaton, 122, at 194.

The main purpose of a bankruptcy law is the equitable distribution of the insolvent estate among all creditors. If a state law accomplishes that purpose, it is suspended by the Bankruptcy Act.

The meaning of the term "the subject of bankruptcies" as contained in the Constitution, does not necessarily involve the element of discharge. In the case of *In re Klein,* 1 Howard 277, at 280, Mr. Justice Catron, speaking for the Court, said:

"In considering the question before me, I have not pretended to give a definition; but purposely avoided any attempt to define the mere word 'bankruptcy'. It is employed in the Constitution in the plural, and as part of an expression: 'the subject of bankruptcies.' The ideas attached to the word in this connection, are numerous and complicated; they form a subject of extensive and complicated legislation; of this subject, Congress has general jurisdiction; and the true inquiry is: To what limits is that jurisdiction restricted?

"**I hold, it extends to all cases where the law causes to be distributed the property of the debtor among his creditors; this is its least limit.** Its greatest, is a discharge of the debtor from his contracts. And all intermediate legislation, affecting substance and form, but tending to further the great end of the subject—distribution and discharge—are in the competency and discretion of Congress.

"With the policy of a law, letting in all classes, others as well as traders; and permitting the bankrupt to come in voluntarily, and be discharged without the consent of his creditors, the courts have no concern; it belongs to the law-makers.

> "I have spoken of State bankrupt laws. **I deem every State law a bankrupt law, in substance and fact, that causes to be distributed by a tribunal the property of a debtor among his creditors;** and it is especially such if it causes the debtor to be discharged from his contracts within the limits prescribed by the case of *Ogden* v. *Saunders*. Such a law may be denominated an insolvent law; still it deals directly with the subject of bankruptcies, and is a bankrupt law, in the sense of the Constitution; and if Congress should pass a similar law, it would suspend the State law, while the act of Congress continued in force."

See also *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 186.

Remington, in Section 2110 of his work on *Bankruptcy*, says:

> "In order for a system to amount to a bankruptcy system it must provide machinery for throwing a debtor into insolvency involuntarily and for completely administering his assets, and that if the system does so operate then it is a bankruptcy system . . ."

Louis E. Levinthal in an article, "Early History of Bankruptcy Law," 66 Pa. Law Review, 223, says:

> "In other words, bankruptcy law seeks to protect the creditors first from one another and secondly from their debtor. A third object, the protection of the honest debtor from his creditors by means of the discharge, is sought to be attained in some of the systems of bankruptcy, but this is by no means a fundamental feature of the law."

James Monroe Olmstead, in an article, "Bankruptcy, A Commercial Regulation," 15 Harvard Law Review, page 829, traces the early history of bankruptcy legislation and its purposes and concludes that:

> "Its main objects are administration and distribution, rather than relief of the debtor."

Judge Ray, who was a member of the Judiciary Committee of the House of Representatives that passed the Bankruptcy Act of 1898, and was Chairman of the Judiciary Committee that secured the passage of the 1903 amendment, and later became District Judge for the Northern District of New York, and who must have known the legislative intent, said in an opinion in *In re Leslie,* (D. C., N. Y.) 119 Fed. 406, at 410:

> "The main purpose of the Bankrupt Law is to prevent preferences, and secure a fair and equitable division of the bankrupt estate among the creditors, **not to grant discharges."**

That the matter of **distribution** of insolvent estates is within the "subject of bankruptcies" has been recognized by the Supreme Court of Wisconsin. In *Pope* v. *Title Guaranty & Surety Co.,* 152 Wis. 611, at 614, the court said:

> "It has been held, correctly we think, that the 'subject of bankruptcies includes the distribution of the property of the fraudulent or insolvent debtor among his creditors, and the discharge of the debtor from his contracts and legal liabilities, as well as all the intermediate and incidental matters tending to the accomplishment or promotion of these two principal ends.' "
>
> *Leidigh Carriage Co.* v. *Stengel,* 95 Fed. 637, at 647 (C. C. A., Ohio).
> *In re Bininger,* Fed. Cas. 1420 (C. C., N. Y.).
> *In re Barrett & Co.,* 27 Fed. (2d) 159, at 161 (D. C., Ga.).

This court has held that distribution is the element primarily characterizing a statute as a bankruptcy law.

It is our contention that the foregoing review of early bankruptcy legislation demonstrates that while the discharge provision is commonly found in the bankruptcy law, it is in no sense an essential feature thereof, and that a state statute which provides for the general distribution of an insolvent's

estate contains the prime essential of a bankruptcy law and is a bankruptcy law. We believe this position is sustained by *International Shoe Co.* v. *Pinkus*, 278 U. S. 261.

International Shoe Co. v. Pinkus, 278 U. S. 261, considered.

In that case the debtor commenced a suit in the Arkansas court, praying to be adjudged insolvent and for the appointment of a receiver to take and distribute his property as directed by the state statute. The court appointed a receiver with directions to take the property, liquidate it, and notify creditors to make proof of claims with the necessary stipulation that they would participate in the proceedings in full satisfaction of their demands. The state law did not purport to grant a discharge to the debtor, but it did give preference to creditors who in filing their claims agreed in effect that as to their claims the debtor would be discharged. As far as the state law was concerned, creditors could file and participate without this stipulation, but such creditors were subordinated to the preferences mentioned. The plaintiff in the *Pinkus* case, a single creditor, could not invoke bankruptcy proceedings, and accordingly brought suit against the receiver on the theory that the property in the latter's hands was subject to the plaintiff's claim. It was held that the Arkansas law was suspended by the Bankruptcy Act and that plaintiff was entitled to have its claim paid in full by the receiver. Referring to the Arkansas law this court said:

> "It provides for surrender by insolvent of all his unexempt property to be liquidated by a trustee for the payment of debts under the direction of the court. It classifies creditors, prescribes the order of payment of their claims and gives preference to those fully discharging the debtor in consideration of pro rata distribution." (p. 264)

The court said further:

> "The state enactment operates within the field occupied by the Bankruptcy Act. The insolvency of Pinkus was covered by its provisions. He could have filed a voluntary petition. His application to the state court for the appointment of a receiver was an act of bankruptcy; * * * and, at any time within four months thereafter, three or more creditors having claims amounting to $500 or over could have filed an involuntary petition." (p. 264)

The court further said:

> "The general rule is that an intention wholly to exclude state action will not be implied unless, when fairly interpreted, an Act of Congress is plainly in conflict with state regulation of the same subject. *Savage* v. *Jones, supra. Illinois Central R. R. Co.* v. *Public Utilities Comm'n*, 245 U. S. 493, 510. *Merchants Exchange* v. *Missouri*, 248 U. S. 365. In respect of bankruptcies the intention of Congress is plain. **The national purpose to establish uniformity necessarily excludes state regulation.** It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas statute, that intolerable inconsistencies and confusion would result if that insolvency law be given effect while the national act is in force. Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations. *Prigg* v. *Pennsylvania*, 16 Pet. 539, 617, 618. *Northern Pacific Ry.* v. *Washington*, 222 U. S. 370, 378, *et seq. St. Louis, Iron Mt. & S. Ry.* v. *Edwards*, 227 U. S. 265, *Erie R. R. Co.* v. *New York*, 233 U. S. 671, 681, *et seq. New York Central R. R. Co.* v. *Winfield, supra. Erie R. R. Co.* v. *Winfield, supra. Oregon-Washington Co.* v. *Washington*, 270 U. S. 87, 101. It is clear that the provisions of the Arkansas law governing the distribution of property of insolvents for the payment of their debts and

> providing for their discharge, **or that otherwise relate to the subject of bankruptcies,** are within the field entered by Congress when it passed the Bankruptcy Act, and therefore such provisions must be held to have been superseded." (pp. 265-266)

Dealing with the contention that state laws of this character are suspended only if bankruptcy in fact intervenes, this Court pointed out that the plaintiff in error could not invoke jurisdiction of the bankruptcy court and concluded as follows:

> "The enforcement of state insolvency systems, whether held to be in pursuance of statutory provisions or otherwise, would necessarily conflict with the national purpose to have uniform laws on the subject of bankruptcies throughout the United States.
>
> "As all the proceedings were had under the Arkansas insolvency law, we need not decide whether, independently of statute, an assignment for the benefit of creditors on the conditions specified in the decree would protect the property of the insolvent from seizure to pay the judgment. And, as the passage of the Bankruptcy Act superseded the state law, at least **insofar as it relates to the distribution of property** and releases to be given, plaintiff in error is entitled to have its judgment paid out of the fund in the hands of the receiver." (p. 268)

It seems apparent from the foregoing that when the court condemned state laws "that otherwise relate to the subject of bankruptcies" it was intended to declare laws suspended which, like the Wisconsin law, provide for a complete statutory distribution.

While discussing the *Pinkus* case we point out further that Mrs. Pobreslo, the plaintiff in the present case, like the plaintiff in the *Pinkus* case, was a single creditor who was unable to invoke the jurisdiction of the Bankruptcy Court. She filed no claim in the state proceedings, and under the rule of the *Pinkus* case it was not necessary that bankruptcy proceedings be in fact instituted in order to suspend the state law.

Straton v. New, 283 U. S. 318, considered.

This Court again dealt with the question in the case of *Straton* v. *New,* 283 U. S. 318. In that case judgment creditors of a corporation had commenced creditors' suits to marshal and enforce the liens and sell the real estate. **Claims of general creditors were in no way involved.** The suits had been commenced more than four months prior to bankruptcy. The question was whether bankruptcy ousted the state court of jurisdiction in the creditors' suits. This Court pointed out that:

> "The purpose of the Bankruptcy Law, passed pursuant to the power of Congress to establish a uniform system of bankruptcy throughout the United States, is to place the property of the bankrupt, wherever found, under the control of the court, for equal **distribution** among the creditors." (p. 320)

It should be noted that nothing was said about discharge being an essential element of a bankruptcy law.

The Court proceeded to analyze the nature of the receivership proceedings in the state court there involved, and said:

> "This statute says nothing about a **distribution** of assets amongst general creditors. It contains no provision that lien claims presented which cannot be paid because the proceeds of the sale are insufficient shall be wiped out as debts of the defendant. It does not purport to discharge the debtor from his indebtedness generally. * * * The act is in no sense an insolvency statute, and a proceeding thereunder is not, therefore, avoided by the adjudication of the debtor as a bankrupt." (p. 329)
>
> *Straton* v. *New,* 283 U. S. 318.

This language indicates quite clearly that if this were a general winding up proceeding under the state statute, with provision for a distribution of assets among general creditors, it would be a bankruptcy proceeding.

In the same case, referring to the decision in *In re Watts*, 190 U. S. 1, and to the rule there stated, the Court said:

> "This was merely a statement of the well settled principle that **a general winding up receivership is tantamount to an insolvency proceeding** which will be superseded by bankruptcy, and, a fortiori, if, as in that case, the petition is filed within four months of the appointment of the receiver."

This language makes clear that **general winding up receiverships** or proceedings under state statutes providing for the distribution of assets among general creditors **are insolvency proceedings** which are suspended during the existence of the National Bankruptcy Act, regardless of the absence of discharge provisions.

The lower federal courts have held that discharge is not an essential element of a bankruptcy law.

In *Straton* v. *New*, 283 U. S. 318, at 330, this Court cited with approval the following cases construing state laws as being in conflict with the bankruptcy law, and therefore suspended:

In re Weedman Stave Co., 199 Fed. 948 (D. C., Ark.).
In re Smith, 92 Fed. 135 (D. C., Ind).
In re Salmon, 143 Fed. 395 (D. C., Mo.).
In re F. A. Hall Co., 121 Fed. 992 (D. C., Conn.).
In re Storck Lumber Co., 114 Fed. 360 (D. C. Md.).

All of these cases involved state laws which contained no discharge provision but which provided for statutory distribution. The Supreme Court of Wisconsin disposed of them on the theory that they merely held that proceedings under a voluntary assignment in the state court were superseded

if bankruptcy actually intervened within four months. Without reviewing the facts of the cases in detail we assert without hesitation that they hold that state insolvency laws containing no discharge provision are *ipso facto* suspended during the existence of the Bankruptcy Act, regardless of whether bankruptcy proceedings are invoked in the particular case.

In *In re Weedman Stave Co.*, 199 Fed. 948, 950 (D. C., Ark.), the Court pointed out at the very outset that the receiver under the statute had been appointed more than four months prior to the institution of bankruptcy proceedings. In the same case the Court said:

> "The elements of an insolvency law are insolvency, surrender of property, its administration by a receiver or trustee, distribution of the assets among the creditors and a provision for priorities or other matters not permissible in the absence of such a statute. A provision for the **discharge** of the debtor from the unpaid balances of his debts is not essential to make it an insolvency law. *In re Curtis* (D. C.), 91 Fed. 737; *In re F. A. Hall Co.* (D. C.), 121 Fed. 992; *In re Salmon* (D. C.), 143 Fed. 395; *Harbaugh* v. *Costello*, 184 Ill. 110, 56 N. E. 363, 75 Am. St. Rep. 147."

In the case of *In re Smith*, 92 Fed. 135, 137 (D. C., Ind.), the Court was dealing with a state statute containing no provision for discharge, and held that it could not stand side by side with the federal act, without any reference to the question whether bankruptcy proceedings had actually been invoked. The opinion of Judge Baker in this case so ably states the considerations which we deem controlling that we quote it at some length:

> "The statute of this state (2 Burns' Rev. St. 1894, Secs. 2899-2920, inclusive; Rev. St. 1881, Secs. 2662-2683, inclusive) provides that any debtor or debtors in embarrassed or failing circumstances may make a general assignment of all his or their property in trust for

the benefit of all his or their bona fide creditors, and all assignments hereafter made by such person or persons for such purpose, except as provided by the statute, should be deemed fraudulent and void. The debtor or debtors making a general assignment are authorized to select his or their trustee, who shall qualify and serve, unless the creditors representing in amount one-half of the liabilities petition the court for his removal and the appointment of another trustee. The administration of the debtor's estate so assigned is placed under the control and jurisdiction of the proper circuit court of the state. The statute provides for the conversion of the assets into money, the collection of debts due the insolvent, the proof of claims by creditors, the distribution of the proceeds arising from the property assigned among the creditors according to their respective priorities, and for the final settlement of the trust estate and the discharge of the trustee. **There is no provision for the discharge of the insolvent debtor.** This statute constitutes an insolvency law, and regulates the making of an assignment, which must embrace all the property of the debtor, as well as every step to be taken in winding up the estate of the bankrupt, to the distribution of its proceeds among those entitled to share therein, all to be administered in a state court possessed of general jurisdiction at law and in equity. It embraces the same persons and subject-matter as the bankruptcy act, and, if the state law still remains in force, every insolvent's estate may be administered in a state court, and must be so administered, if it first acquires jurisdiction, because, if the state statute continues in force, there would be two courts (state and national) possessing concurrent jurisdiction over the same person and the same subject-matter, and whichever of the two first acquired jurisdiction would retain it, and administer the estate of the insolvent, to the exclusion of the other. The bankruptcy act contemplates no divided jurisdiction. It would cease to possess any vital force or efficiency, if the state court, proceeding under our state insolvent law, may hold possession of the bankrupt's estate, collect in the debts, allow claims, and make final distribution among those entitled to participate therein, leaving to this court nothing but the adjudication of bankruptcy

and the discharge of the bankrupt. Such a construction is inadmissible, because it would render inoperative numerous express provisions of the bankruptcy act. The state statute and the bankruptcy act cannot stand together. The bankruptcy act is the supreme law of the land, enacted in pursuance of an express grant of constitutional authority; and, insofar as any state law is in conflict with it, such law is suspended and remains inoperative until the federal enactment is repealed. All matters embraced in the bankruptcy act must be controlled and governed by its provisions. Among these are the right and duty of the bankruptcy court to have insolvent estates settled in and by it, under and in accordance with the provisions of the bankruptcy act; to have acts of bankruptcy affecting the settlement of estates determined by it (section 3); to have the rights of debtors to file voluntary petitions and of creditors to file involuntary petitions, determined by it (section 4); and to have liens and preferences governed by it (sections 60, 67). These and various other provisions of the bankrupt act affecting the conduct and rights of debtors and creditors are different from those found in the statute of this state touching general assignments. In my opinion, the operation of the state law is suspended, and the state courts are without any jurisdiction or authority to administer the estates of bankrupts or insolvents."

In re Salmon, 143 Fed. 395, 405 (D. C., Mo.), squarely held that the state law, without a provision for discharge, was suspended by the passage of the National Bankruptcy Act. The Court said:

> "Again, to render a state insolvency law inoperative because in contravention of the federal bankrupt act, **it is not essential that the state act shall contain a provision for the discharge of the debtor.** It is rather thought such provision for discharge is an incident to, but not an essential part of, such law". (citing cases.)

To the same effect are the holdings in the case of *In re F. A. Hall Co.,* 121 Fed. 992 (D. C., Conn.), and *In re Storck Lumber Co.,* 114 Fed. 360 (D. C., Md.).

In the case of *Hammond* v. *Lyon Realty Co.*, 59 Fed. (2d) 592, 594 (C. C. A. 4th Cir.), the Court said:

> "The Court of Appeals of Maryland, in *Hughes* v. *Hall*, 118 Md. 673, 677, 85 A. 946, seemed to regard the Maryland statute as an insolvency law; but it is argued that this view must not be accepted literally because the Supreme Court in *Stellwagen* v. *Clum* and *International Shoe Company* v. *Pinkus, supra*, has emphasized the importance of the discharge of the insolvent from his debts in any system of bankruptcy law. It was not decided in either of these cases that there might not be a state insolvent law that would be superseded by the National Bankruptcy Act, although not providing for the discharge of indebtedness. See *Stellwagen* v. *Clum*, 245 U. S. 616, 38 S. Ct. 215, 62 L. Ed. 507. Nor was it decided or suggested that the provisions of a state law looking toward the settlement of the affairs of an insolvent corporation must be given effect unless the law comprises all of the essential elements of a general insolvency statute."

In the case of *In re Reynolds*, Fed. Cas. No. 11, 723 (C. C., R. I.), the Court said:

> "Our state insolvent law authorizes, upon the application of the debtor, proceedings for the distribution of his property only, and the discharge of his person from imprisonment. **It does not release the debt.** The bankrupt law of 1867 does all this upon such application, and also releases the debt. Assuming the constitutionality of the bankrupt law in other respects, which has neither been discussed or denied before us, we must hold that, under the decisions and concurring practice to which we have referred, these provisions of the bankrupt law authorizing a debtor to apply for and obtain a discharge of his debts, and providing for a distribution of all his property among all his creditors, are within the legislative power of congress under this grant in the constitution; the system, differing in this department only from our insolvent law in extending the release, but not at all in the provisions for taking possession, through officers appointed by the court, of the entire property of the in-

solvent, and distributing it among all his creditors, covers all the provisions of our insolvent law. It legislates for all of them, and for more in its voluntary department, and adds thereto the involuntary department of the law enabling creditors to move for all these processes against the debtor in their own behalf. We must, therefore, find that congress has, within its constitutional powers, legislated upon the entire subject of our insolvent laws. And such legislation, it has long been settled, when exercised, suspends the state legislation upon the same subject. We must, therefore, grant the motion."

In *Carling* v. *Seymour Lumber Co.*, 113 Fed. 483 (C. C. A. 5th), the court dealt with the Georgia statute in which the only provision for discharge was that the chancellor might **recommend** discharge to the creditors. This entire law was held suspended by the Bankruptcy Act.

That discharge is not the essential characteristic of a bankruptcy law is emphasized in the case of a corporation, as to which the discharge is a negligible feature.

In the case *In re Merchants' Ins. Co.*, Fed. Cas. No. 9,441 (D. C., Ill.), the court said:

"We might further answer this objection by the suggestion that a discharge of an insurance company's liabilities under this state statute and proceedings in the state courts would be, in the nature of things, superfluous and unnecessary, for the reason that the main object of the proceeding is to forfeit the charter and franchises of the corporation, and why assume to discharge from further liability a debtor whose legal entity is to be dissolved? If its corporate existence is to be terminated it matters little what becomes of its unpaid balances.

"It also seems clear to us that in so far as a state law attempts to administer on the effects of an insolvent debtor and distribute them among creditors, it is to all intents and purposes an insolvent law, although it may

not authorize a discharge of the debtor from further liability on its debts."

In *Exploration Mercantile Co.* v. *Pacific Hdwe. & Steel Co., et al.*, 177 Fed. 825, 828 (C. C. A. 9th, Nev.), the Court said:

> "Subsequent sections provide for notice to creditors, presentation of claims to the receiver within a limited time, the barring of claims not so presented, the sale of property, and the distribution of assets. **Although the act does not provide for the discharge of the debtor, and is not so entitled, it is essentially an insolvency act.** The winding up of the corporation discharges its debts. 'An insolvent law is a law for the relief of creditors by an equal distribution among them of the assets of the debtor, but does not necessarily involve the discharge of the debtor.'"

In the case of *In re F. A. Hall*, 121 Fed. 992, 997 (D. C., Conn.), the Court said:

> "The main purpose of the law is the collection and distribution of the assets. The discharge is an incident to, but not a part of, the bankruptcy proceedings, as to such distribution. **In the case of a corporation there can be no discharge.** The corporation ends its existence, but its stockholders cannot be discharged and if there is no liability there is no need of a discharge; . . ."

Judge Cowie, who decided the present case in the trial court, thus characterized the proceedings:

> "Tested by the inevitable result of these assignment proceedings if permitted to proceed, the property of this corporation will be disposed of and distributed among such creditors as have filed their claims and the corporation be **discharged of its debts,** just as effectually as though an order of the court were made barring all creditors who have not so filed.
>
> "It is simply an ingenious way of going through bankruptcy under the guise of a common law assignment. There remains, after this trust is complied with,

no property of the Boyd Company and no personal liability on the part of its stockholders. The corporation is discharged of its debts and its creditors are barred of any remedy." (R. 28)

The trial court said further:

"So, with all due respect to eminent authority to the effect that the discharge feature of the national bankruptcy act is the very essence of the act, I am still of the opinion that the prime purpose of **that act in the first instance was to provide a uniform method for the just and equitable distribution of the assets** of the estates of bankrupts among creditors and to avoid confusion and conflict among the different states in the administration of such estates, and **that the discharge feature was secondary in the minds of Congress when the act was passed.** This, from the language of the *Pinkus* case, seems too plain and significant to admit of serious dispute.

"So I fail to see a substantial difference between the statutes of Arkansas and the provisions of Chapter 128 of this state, or this common law assignment; if we choose to so regard it. The difference is in words only. In either case, it is an invasion of the field of the national bankruptcy act and void in toto. The position of the garnishee defendants is a mere play upon words, a legal beating of the devil around the bush." (R. 30)

That discharge is not essential to bankruptcy is illustrated by the fact that the Bankruptcy Act expressly prohibits discharge to certain debtors.

The fallacy of the idea that there must be a provision for discharge in order to classify a statute as a bankruptcy law, is illustrated by the following situation. The federal Bankruptcy Act which was in effect in 1874 absolutely denied discharge to corporations under any circumstances. It was claimed that discharge was of the essence of a bankruptcy law, and that Congress could not make a bankruptcy law by

merely designating it as such if it did not include the feature of discharge. This contention is fully and ably refuted in the case of *In re California-Pacific Railroad Co.*, Fed. Cas. No. 2,315 (D. C., Calif.). The court said:

> "I can nowhere find it decided or maintained, that a law to be 'a law on the subject of bankruptcy' within the meaning of the constitution must provide for the discharge of all persons subject to its provisions.* * * The Bankruptcy Act, even if all provisions for the granting of discharges were stricken out, would still retain the most important features of a Bankruptcy Law."

The present Bankruptcy Act (Section 32) expressly provides that the discharge provisions are wholly inapplicable to any debtor who has been granted a discharge in a voluntary proceeding within six years. Could it be said that as to such a debtor the law is not a bankruptcy law? With respect to a debtor of that class, a proceeding under the Wisconsin statute would do everything from beginning to end that a court of bankruptcy would do, in a different manner, to be sure, but with like effect so far as the unpaid claims of creditors are concerned. As to such a debtor the state law would operate wholly in the field occupied by the Bankruptcy Act. In a case of that kind discharge would not be involved under either the federal or the state law. According to appellee's logic Congress, being limited to the "subject of bankruptcies," would have no power to legislate for distribution of assets without discharge of the debtor.

On the contrary we claim that in such a situation the case would be clearly within the jurisdiction of the bankruptcy court, even though there could be no discharge, and that a state law which purported to grant jurisdiction to the state court to do everything that could be done under the Bankruptcy Act would be invading the field covered by the national legislation.

A Congress that has power to attach conditions to discharge has power to deny it entirely, and a law providing

for denial of discharge would be no less a law dealing with the "subject of bankruptcies."

Congress by making an assignment an act of bankruptcy has clearly indicated its intention that assignments for creditors should be administered in the federal court.

In the case of *In re Curtis,* 91 Fed. 737, at 740, (D. C., Ill.), the court said:

> "The object of enumerating in the national bankrupt act what shall constitute an act of bankruptcy is for the very purpose of specifying with certainty what estates shall be administered in the bankrupt court. And, in declaring that whosoever should attempt to distribute his estate by a general assignment should be adjudged a bankrupt it is also the plain intent of the law that such person should not be permitted after the 1st day of July, 1898, to do so, but, instead, **such estate must be administered in the precise manner pointed out by the national bankrupt act.** From this it is obvious that not only the main objects of the state and federal laws are identical, but also that they both expressly provide a manner of administering the estate of whosoever shall make a general assignment. This being the case one must yield to the other. One must be operative and the other inoperative. Both cannot be in full force and effect at the same time. Which remains paramount and operative cannot be in doubt. That the state law shall be suspended is now well settled, and it is therefore the opinion of this court that the proceedings under the general assignment made by the Bank of Waverly, and in the Morgan county court, are wholly unauthorized and void. Public policy, as manifested by the bankrupt act, demands that all insolvent estates (of a certain value) shall be administered in the bankrupt court and in accordance with a uniform system."

In the case of *In re Gutwillig*, 90 Fed. 475, at 477 (D. C., N. Y.), the Court said:

> "Voluntary assignments of all a debtor's property in trust for creditors, are just as incompatible with the purposes of the bankrupt act as state insolvent systems, and for precisely the same reasons, viz. because if allowed to stand as against a trustee in bankruptcy they defeat the most essential elements of the bankrupt law; namely, the distribution of the debtor's assets in the manner prescribed by the bankrupt act, and through the agencies to which that act commits them. Creditors are vested by the act itself with a right to have the bankrupt's assets administered not only in accordance with the act, but through the instrumentalities and under the supervision which the act provides; and this right manifestly cannot be nullified at the mere option of the debtor."

II.

UNIFORMITY, THE FUNDAMENTAL AIM OF THE CONSTITUTIONAL GRANT OF POWER TO CONGRESS WITH RESPECT TO BANKRUPTCIES, WOULD BE WHOLLY DESTROYED BY THE ENFORCEMENT OF CONFLICTING SYSTEMS SUCH AS THAT SET UP BY THE WISCONSIN STATUTES.

Uniformity is destroyed even though the state systems copy as far as possible the provisions of the federal act.

Referring again to Article I, Section 8 of the Constitution, the grant of power to Congress "to establish uniform laws on the subject of bankruptcies" is contained in the same section granting power to Congress to establish a uniform rule on naturalization, and immediately follows the grant of power to regulate interstate commerce. Clearly the makers of the Constitution, and the Congress that exercised the power it confers, recognized the vast sweep of interstate com-

merce and meant to free interstate traders from the confusion and harassment attendant upon a multiplicity of variant local laws. James Madison, writing in *The Federalist*, said:

> "The power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce and will prevent so many frauds where the parties live or their property may lie, or be removed into different states, that the expediency of it seems not likely to be drawn into question."

Congress has acted under the constitutional grant of power and has thereby entered the entire field of bankruptcy. Having done so, states are excluded from regulating the same subject. When the federal door is open, the state door is automatically shut.

> "The plain purpose of the Bankruptcy Act to establish uniformity necessarily excludes state regulation of the subject matter, whether interfering with the Act or complementary, additional or auxiliary."
>
> *International Shoe Co.* v. *Pinkus*, 278 U. S. 261.

Uniformity, as that term is used in the Constitution, does not, therefore, mean merely the absence of actual conflict between the provisions of state and federal laws on this subject. Uniformity is not achieved by the enactment of numerous state laws that copy, as nearly as may be, the provisions of the National Act. **Uniformity implies one national system exclusive in its field.**

> "For, if every state in the Union were to pass a bankrupt law in the same unvarying words, although this would, undoubtedly, be an uniform system of bankruptcy in its literal sense, it would be very far from answering the grant to Congress."
>
> *Ogden* v. *Saunders*, 12 Wheaton 213, 275.

The Wisconsin system violates the requirement of uniformity in two respects: first, in that it sets up an additional sys-

tem operating upon the same persons and upon the same subject matter; and secondly, in that its provisions in fact are inconsistent and in conflict with the provisions of the National Act.

Uniformity is destroyed by the enforcement of the Wisconsin statute, which in fact contains serious conflicts and inconsistencies with the federal act.

Counsel for the appellees realized, after this proceeding was instituted, that the distribution provided by the state statute (Sec. 128.16) was in conflict with the Bankruptcy Act, and sought to meet this criticism by having the assignor amend the assignment to provide that distribution should be in accordance with the terms of the Bankruptcy Act. Now, obviously, if the first assignment was effective to transfer title to the property, the assignor could not subsequently modify its terms. Furthermore, the distribution being specifically prescribed under the state statute, the state court would not enforce any other method of distribution.

It is sufficient to say that the Wisconsin Supreme Court gave no effect to this attempted amendment, but it does stand as an open confession of the inconsistency between the two acts.

The state courts of Wisconsin have not thus far undertaken to administer the National Bankruptcy Act, and it is indicated pretty definitely in *Bromley* v. *Goodrich, et al.,* 40 Wis. 131, that they do not propose to do so.

If the only requirement for the survival of a state statute were that its provisions be similar to and not in conflict with the Bankruptcy Act, then a state law with a discharge provision should be sustained *a fortiori,* because that would be even more nearly identical with the federal law.

But if it be necessary to show conflict in fact between the state and federal systems of distribution, such conflict is apparent in the present case.

Distribution under the Wisconsin law is less favorable to general creditors than under the Bankruptcy Act.

The garnishee affidavit alleges and it is not denied:

> "That the differences between Chapter 128 Wisconsin Statutes, 1929, and the Bankruptcy Act are such as to cause a distribution under the said Chapter 128 Wis. Stats. of 1929 which is less favorable to general creditors of plaintiff's standing than the distribution provided for by the Federal Bankruptcy Act." (R. 7)

It can be said of the Wisconsin statute as was said by this Court of the Arkansas statute, that

> "Intolerable inconsistencies and confusion would result if that insolvency law be given effect while the National Act is in force."
>
> *International Shoe Company* v. *Pinkus,* 278 U. S. 261, 265.

The two laws differ in the order of priorities:

The order of payment under the National Bankruptcy Act and under the Wisconsin law is as follows:

NATIONAL ACT:

1. Cost of preserving estate.
2. Filing fees in involuntary cases and expenses of recovering property.
3. Cost of administration.
4. Expense of creditors in opposing compositions.
5. Wages.
6. Taxes due to the United States, state, county, district and municipality.
7. Other debts having priority by law.
8. General creditors.

STATE ACT:

1. Unpaid taxes.
2. Debts due United States.
3. Debts due the state.
4. Expense of the assignment and management of the trust.
5. Wages.
6. General creditors.

Differences in respect to payment of taxes:

The state act (Sec. 128.16), as construed by the State Court, requires the absolute payment in full of all taxes levied against the property assigned. The Bankruptcy Act (Sec. 64a) provides that no taxes shall be ordered paid, the amount of which exceed the value of the bankrupt's interest in the property taxed. This might make a vital difference to general creditors.

Differences in respect to payment of wage claims:

Under the state law wages earned within **six months** preceding the assignment are entitled to priority (Sec. 128.16). The Bankruptcy Act, Sec. 64 (b-5), provides for the payment of wages earned within the preceding **three months** only, and limits the amount of wages to $600 per claimant. The state act includes a wider class of employees entitled to wage priority than does the Bankruptcy Act, thus reducing the amount available for general creditors.

Differences in respect to payment of dividends:

The Bankrupcy Act provides for a payment of first dividends within thirty days after adjudication, while the state act permits no dividends to general creditors until after all priorities have been paid in full (Sec. 128.16). The state law provides that no creditor who has failed to file within three months shall participate in any dividend made before his claim is filed (Sec. 128.16). The Bankruptcy Act, Section 65 (c), provides that parties who file subsequent to the first dividend shall be paid a sufficient amount so that their total receipts will be on the same percentage as those of creditors who have theretofore been paid.

Differences in respect to speedy distribution:

It is conceded that one of the prime purposes of the Bankruptcy Act is to afford creditors prompt and speedy distribution.

> "It is obviously one of the purposes of the Bankrupt Law that there should be a speedy disposition of the bankrupt's assets. This is only second in importance to securing equality of distribution. The Act is filled with provisions for the quick and summary disposal of questions arising in the progress of the case without regard to usual modes of trial attended with some necessary delay."
>
> *Bailey* v. *Glover,* 21 Wallace 342, 346.

> "A proceeding in bankruptcy is intended to get the assets as speedily as possible into the hands of the creditors whose rights are first of all to be considered."
>
> *In re Soloway & Katz et al.,* 234 Fed. 67, 68-69 (C. C. A. 2d, Conn.).

The state law contemplates no such prompt and speedy action; and if it did, that purpose would be wholly circumvented by the terms of the Boyd assignment, authorizing indefinite continuance of business, and by the manner of administering the estate in the state court. This garnishment proceeding was instituted a little more than four months after the assignment was made, and up to that time there had been no pretense of paying any dividend to creditors. Under the Boyd assignment creditors have no assurance that the business will not be carried on several years longer.

Differences in respect to avoiding of preferences:

Under the state law, Section 128.02, preferences given within a **sixty-day** period may be avoided, while the Bankruptcy Law, Section 67 (c), makes voidable preferences made within **four months.**

The determination of what preferences shall be set aside and what claims shall be allowed, and the judicial machinery adopted for that purpose, are important factors in accomplishing the equal and equitable distribution of the debtor's property which is the main object of the National Act. Uniformity requires that the federal legislation shall control these matters.

> **"We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them."**
>
> *U. S. Fidelity Co.* v. *Bray*, 225 U. S. 205, 217.

Differences in respect to notices:

The bankruptcy law provides definitely for notice to creditors not only of the first meeting but of every other proceeding of any consequence (Chapter 6), while Chapter 128 seems to provide for only one notice to creditors (Sec. 128.14).

Differences in respect to selection of trustee:

Under the Bankruptcy Act the creditors are permitted to select their own trustee, while under Chapter 128 such selection is made by the debtor except that if the proceedings come under Chapter 334, Laws of 1897 (see p. 10 above), the selection is made by the court.

Differences in respect to examination of bankrupt:

Under the Bankruptcy Act, Section 55 (b), explicit provisior is made for the examination of the bankrupt by the creditors at the first meeting. No such provision is found in Chapter 128, and the jurisdiction of the court to order an examination of the assignor in an assignment proceedings is at present a debated question in Wisconsin.

Differences in respect to persons subject to involuntary proceedings:

For example, the Wisconsin Act, if operative, does not exclude farmers from its involuntary provisions. The Bankruptcy Act does. Was it the intention of Congress that states might set up laws which permitted throwing farmers into involuntary bankruptcy? This question was recently presented to the Supreme Court of Minnesota and was answered in the negative, that court saying:

> "We are convinced that, while the National Bankruptcy Act (11 USCA) is in force, chapter 90 of the General Statutes of 1913 is in abeyance and inoperative as to farmers, because it attempts to act within the field appropriated by congress under the National Bankruptcy Act. To hold otherwise would result in endless confusion and would circumvent the purposes of the act of congress which evidently intend to protect the farmer from involuntary bankruptcy proceedings. If we were to hold that chapter 90 might be invoked for the purpose of the distribution of assets alone, and that only the provision for release of debtors is to be inoperative during the time that the National Bankruptcy Act is in effect, the Insolvency Act could be used for the purpose of forcing farmers to take voluntary proceedings under the National Bankruptcy Act, thus accomplishing indirectly what congress evidently did not intend to permit."
>
> *Adrian State Bank* v. *Klinkhammer,* 182 Minn. 57.

It appears from the Revisor's note to the Wisconsin Statutes, that the Wisconsin involuntary bankruptcy system con-

tained in Chapter 334, Laws of 1897, was taken from Chapter 90 of the General Statutes of Minnesota. (Wisconsin Annotations of 1914, p. 568.)

There are other features in which the State and Federal law conflict, but the foregoing are sufficient to demonstrate that if the Wisconsin law is operative, then debtors (and creditors in involuntary proceedings) are given a choice in Wisconsin between two conflicting systems of administering bankrupt estates.

III.

IN ORDER TO INVALIDATE AN ASSIGNMENT MADE UNDER THE STATE LAW, IT IS NOT NECESSARY THAT BANKRUPTCY INTERVENE. A SINGLE CREDITOR WHO CANNOT INVOKE THE BANKRUPTCY ACT MAY DISREGARD THE ASSIGNMENT IN GARNISHMENT PROCEEDINGS.

The garnishee affidavit alleges, and it is admitted by the pleadings:

> "That diligent effort has been made to secure the joinder of a sufficient number of creditors of the said The Joseph M. Boyd Company with plaintiff in invoking the jurisdiction of the Federal Court of Bankruptcy, but plaintiff was unable to secure the joinder of other creditors to that end." (R. 7)

The allegations contained in the garnishee affidavit must be taken as evidencing a good faith effort on the part of appellant to invoke the provisions of the Bankruptcy Act. Having been unable to do so, she stands in exactly the same position as the plaintiff in the *Pinkus* case, and it should be held, as it was there held, that as to her the proceedings in the state court are void, regardless of the institution or non-institution of bankruptcy proceedings.

Prior to the decision in the *Pinkus* case it seems to have been considered in many quarters that state laws in conflict with bankruptcy laws were suspended only if bankruptcy proceedings were in fact instituted. The fallacy of this view was demonstrated in the *Pinkus* case, where that question was completely set at rest. Thus in *Hazelwood* v. *Olinger Building Department Stores,* 205 Wis. 85, the Supreme Court of Wisconsin, referring to the *Pinkus* case, said:

> "This case no doubt came as a surprise to a good many lawyers. While it had everywhere been freely conceded that the Bankruptcy Act was paramount to the insolvency laws of the state, it had been generally thought since the decision of *Boese* v. *King*, 108 U. S. 379, 2 Sup. Ct. 765, that a state assignee took title and might proceed until his authority was superseded by the invocation of the provisions of the federal Bankruptcy Act. It is held, however, in *International Shoe Co.* v. *Pinkus* that where the property is impounded under a state law which provides not only for its pro rata distribution among the creditors as far as it will go, but all claims filed are subject to be discharged upon the application of the bankrupt, the state law is entirely superseded and that an assignee under the state law taking under such a statute, takes no title as such." (p. 88)

We concede the correctness of the state court's view as to the general effect of the Bankruptcy Act upon state insolvency laws, but challenge the inference that this effect is limited only to state laws which contain discharge provisions.

IV.

CHAPTER 334, LAWS OF 1897, RELIED UPON BY THE STATE COURT TO DEFEAT APPELLANT'S RIGHT TO GARNISH, IS SUSPENDED AND WHOLLY VOID REGARDLESS OF THE VALIDITY OF OTHER PARTS OF CHAPTER 128, BECAUSE IT CONSTITUTES A COMPLETE SCHEME OF INVOLUNTARY BANKRUPTCY.

Appellant's claim up to this point has been that all of Chapter 128 is suspended, even though it be conceded that the discharge provisions which came into the law under Chapter 385, Laws of 1889, have been properly held to be separable and suspended by the earlier decisions of the Wisconsin Supreme Court.

We now direct our argument specifically against the validity of this particular assignment and particularly against the involuntary procedure set up by Chapter 334, Laws of 1897.

The assignment is void if considered solely as a common law assignment and without reference to any of the statutory provisions. It contains at least three vices designated by the court as badges of fraud (R. 32).

Not only is this assignment void as a common law assignment, but it is void under the express provisions of those portions of Chapter 128 which the Supreme Court of Wisconsin has held to be valid legislation merely regulatory of common law assignments (Sec. 128.06).

This is exactly the kind of a void assignment that was contemplated by Chapter 334, Laws of 1897 (see p. 10 above). The Boyd Company, by making this void assignment, brought itself automatically within the provisions of that chapter. As a penalty for an act which was in effect an act of bankruptcy, the entire estate of the insolvent Boyd Company was automatically thrown into the lap of the court to be admin-

istered by an assignee appointed by the court, without any reference whatsoever to the will or wishes of the assignor.

This provision in the state law, to all intents and purposes, is identical with the provisions in the bankruptcy law which make certain acts of the debtor the basis for an involuntary bankruptcy petition. From the very outset, therefore, the proceeding has been administered by the state court, not as a voluntary assignment, but as an involuntary statutory proceeding. The estate has been administered under a state law which, like the Bankruptcy Act:

(1) Sets up an involuntary proceeding which may be invoked against a debtor who commits acts which are in effect acts of bankruptcy.

(2) Provides for a statutory, not voluntary, distribution of assets under the direction of the court in accordance with the state statute.

(3) Establishes a state tribunal which passes upon claims and determines the validity of preferences.

(4) Provides for a distribution among general creditors, less favorable than distribution under the Bankruptcy Act.

(5) Embraces within its jurisdiction the same persons, subject matter, and rights as the National Bankruptcy Act.

(6) Authorizes a discharge to the debtor.

The Supreme Court of Wisconsin did not treat any of the parts of Chapter 334, Laws of 1897, as being severable, but held it to be valid in toto.

Chapter 334, Laws of 1897, after setting up this involuntary procedure, provided that:

> "The same proceedings may be taken and with like effect under the provisions of this section by such insolvent debtor **for a discharge from his indebtedness** as if

any decided opinion upon this head; for the decision of the question is not required for the disposition of the case." (91 U. S. at 502.)

The effect of the bankruptcy law upon state insolvent laws was not involved because, as the court said:

> "The assignment in this case must, therefore, be regarded as though the Statute of Ohio, to which reference is made, had no existence." (91 U. S. at 502.)

The differences between the assignment in *Mayer* v. *Hellman* and that in the Boyd case are apparent. In the former case the assignment was valid as a common law assignment. In the present case the assignment is void as a common law assignment (see p. 17 above). In the former case the assignment was not in violation of any statutory provisions. In the present case the assignment is in violation of express statutory provisions (p. 12 above). In the former case the assignment was treated as a common law assignment and as if the state statutes were not in existence. If the Boyd assignment be so regarded, it is void. Such validity as there is to the title of the assignees in the present assignment is based entirely upon Chapter 334, Laws of 1897; hence there is squarely presented in the present case the question of the conflict between the state and the federal law, a question not involved in *Mayer* v. *Hellman*.

Boese v. King, 108 U. S. 379, considered.

Boese v. *King* does not support appellee's position. This court did not, in that case, sustain the validity of the New Jersey assignment law, but held rather that the New Jersey law was superseded. It was, however, held that judgment creditors who might have secured an equality of distribution by invoking the bankruptcy law could not sit by and thereafter invoke the aid of the court in securing preferences.

The inapplicability of *Boese* v. *King* to the present situation is apparent from the language of this court referring to that case in *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, at 267, where the court said:

> "The decision below is not supported by *Boese* v. *King, supra.* In that case there was an assignment under the New Jersey insolvency law. Some years later creditors obtained judgment against the assignor in New York. A receiver appointed in supplementary proceedings sued the assignees in New York to compel payment of the judgment out of funds they had on deposit there. The highest court of the State denied relief, and the case was brought here on writ of error. This Court held that the assignment was sufficient to pass title; and, **as the Bankruptcy Act had superseded the New Jersey insolvency law,** all the creditors were entitled unconditionally to share in pro rata distribution. The receiver was held not entitled to recover because the judgment creditors could have secured equal distribution by the institution of bankruptcy proceedings, but instead they waited until after the expiration of the time allowed for that purpose, and then by the New York suit sought to obtain preference and full payment. In the course of the opinion, it is said (p. 386): 'It can hardly be that the court is obliged to lend its aid to those who, neglecting or refusing to avail themselves of the provisions of the act of Congress, seek to accomplish ends inconsistent with that equality among creditors which those provisions were designed to secure.' The case now before us is essentially different. Plaintiff in error could not invoke jurisdiction of the bankruptcy court."

It is significant that this court, in its opinion in *Boese* v. *King,* expressly held that the assignees under the assignment there involved

> ". . . had authority to sell the property and distribute the proceeds among all the creditors, disregarding so much of the deed of assignment as required the assignees, in the distribution of the proceeds, to conform to the local statute." (108 U. S. at 386.)

This is a clear holding that the provisions of the state law relating to distribution are suspended.

Stellwagen v. Clum, 245 U. S. 605, considered.

The state court placed considerable reliance upon *Stellwagen* v. *Clum*, 245 U. S. 605, and it is therefore important to determine what was there actually held. In that case no attempt was being made, as is being made here, to administer an insolvent estate in the state court under the provisions of a state law. On the contrary, there had been an adjudication in bankruptcy and the trustee in bankruptcy was seeking to set aside a conveyance on the ground that it was fraudulent under the provisions of the state law although not a voidable preference under the provisions of the bankruptcy law. He was proceeding under Section 70 (e) of the Bankrupt Act, which provides:

> "The trustees may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided and may recover the property so transferred or its value from the person to whom it was transferred unless he was a bona fide holder for value prior to the date of the adjudication."

The court said:

> "This section as construed by this court gives the trustee in bankruptcy a right of action to recover property transferred in violation of state law."

It was accordingly held that under the express provision of Section 70 (e) of the Bankruptcy Act the trustee might avoid any transfer which a creditor might have avoided and that it was the intent of Congress that he should have the benefit of state laws for the setting aside of fraudulent conveyances.

While the opinion does lay stress upon discharge as being a feature of the present bankruptcy law, the court nevertheless

expressly refrained from holding that only those state laws are suspended which contain discharge features. The court said:

> "And while it is not necessary to decide that there may not be state insolvent laws which are suspended although not providing for a discharge of indebtedness, all the cases lay stress upon the fact that one of the principal requisites of a true bankruptcy law is for the benefit of the debtor in that it discharges his future acquired property from the obligation of existing debts." (245 U. S. at 616.)

To hold that a trustee in bankruptcy may, under the terms of the Bankruptcy Act, avail himself of provisions of a state law in setting aside fraudulent transfers certainly is not the equivalent of holding that proceedings may be had under the state law in the state court to administer insolvent estates.

If the case can conceivably be construed as holding that no state laws are suspended unless they contain a discharge provision, then we respectfully submit that such holding is not in accord with the fundamental nature and purpose of "the subject of bankruptcies" as that term is used in the Constitution. Nor is it in accord with the more recent holding in *International Shoe Co.* v. *Pinkus* to the effect that state laws governing

> ". . . the distribution of property of insolvents for the payment of their debts and providing for their discharge **or that otherwise relate to the subject of bankruptcies** are within the field entered by Congress when it passed the Bankruptcy Act and therefore such provisions must be held to have been superseded." (278 U. S. at 266.)

While the court in *Stellwagen* v. *Clum,* 245 U. S. 605, at p. 615, said:

> "It is only state laws which conflict with the bankruptcy laws of Congress that are suspended; and those which are in aid of the Bankruptcy Act can stand.";

in the later case (*International Shoe Co.* v. *Pinkus*, 278 U. S. 261 at 265), the court said:

> "In respect of bankruptcies the intention of Congress is plain. The national purpose to establish uniformity necessarily excludes state regulation."

In the light of the foregoing we submit that *Stellwagen* v. *Clum* must be confined to the question that was actually decided, namely, that the provisions of state laws relative to fraudulent conveyances may be utilized by a trustee in bankruptcy proceedings, because to that extent they are in aid of the bankruptcy administration, not in competition with it, and therefore no conflict can arise; but that any attempt to administer an insolvent estate in the state court would immediately create conflict with the National Act.

CONCLUSION

It is respectfully submitted that a consideration of the history of bankruptcy legislation and of its fundamental purposes, viewed in the light of the decisions of this Court, demonstrates that to the extent that the Wisconsin assignment law attempts to set up a system for the general statutory distribution of the assets of this or any other insolvent person or corporation, it invades the field occupied by Congress. It is in derogation of the uniformity prescribed by the Constitution. Indeed, it is in actual conflict with the Bankruptcy Act, and is therefore wholly suspended.

In addition thereto, it is respectfully submitted upon a narrower ground, that this particular assignment was from the very outset administered as an involuntary proceeding in the state court under the provisions of Chapter 334, Laws of 1897, which chapter contains every element of an involuntary bankruptcy law, including discharge, and that all of the

statutory provisions contained therein are suspended, and that therefore the appellant, under the express provisions of the Wisconsin garnishment law, is entitled to invoke her remedy of garnishment in this case.

The judgment of the Supreme Court of the State of Wisconsin should be reversed, with directions to affirm the judgment of the trial court.

Respectfully submitted,
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Supreme Court of the United States

OCTOBER TERM, 1932

No. 171

MRS. J. H. POBRESLO,

Plaintiff and Appellant,

vs.

JOSEPH M. BOYD COMPANY,

Defendant,

CLARENCE E. KARN, L. D. ATKINSON, LEO T. CROWLEY and EDWARD J. SAMP,

Garnishee Defendants and Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF RESPONDENTS

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Supreme Court of the United States

OCTOBER TERM, 1932

No. 171

MRS. J. H. POBRESLO,

Plaintiff and Appellant,

vs.

JOSEPH M. BOYD COMPANY,

Defendant,

CLARENCE E. KARN, L. D. ATKINSON, LEO T. CROWLEY and EDWARD J. SAMP,

Garnishee Defendants and Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF RESPONDENTS

NATURE OF THE CASE AND STATEMENT OF FACTS

This is an appeal by the plaintiff from a judgment of the Supreme Court of the State of Wisconsin dismissing this action as against the Garnishee Defendants. The action is one

at law based upon contract against the principal defendant the Joseph M. Boyd Company. More than four months prior to the commencement of the action this company had made an assignment for the benefit of creditors to three trustees who had invoked the jurisdiction of the Circuit Court for Dane County and were administering the property for the benefit of creditors at the time of the commencement of the action. These trustees and a successor trustee were named as garnishee defendants on the theory that the assignment was void and the trustees had in their possession money and property belonging to the debtor corporation.

In the administration of the trust by the trustees the jurisdiction of the trial court had been invoked pursuant to Chapter 128 of the Statutes of the State of Wisconsin which provided for the regulation and administration of voluntary assignments for the benefit of creditors. That Statute is set forth in full in an appendix to this brief.

The trustees in invoking the jurisdiction of the court failed to comply in terms with the Statute in that they took possession of the property of the company before furnishing a bond and at no time furnished a bond in a sum equal to the then assets of the company as required by the Statute, although a bond was filed in amounts fixed by and at times required by an order of the Circuit Court (R. 5).

The plaintiff asserted that this failure to comply with these statutory provisions voided the assignment under the provisions of Section 128.06 which provided in part as follows:

> "All voluntary assignments or transfers . . . for the benefit of or in trust for creditors shall be void as against the creditors of the person making the same unless the assignee shall be a resident of this state and shall before taking possession of the property assigned and before taking upon himself any trust conferred upon him by the instrument of assignment, deliver to the County Judge or Court Commissioner of the county in which such assignor or someone of the assignors at the

time of the execution of such assignment shall reside, not being a creditor of such assignor, a bond duly executed to the clerk of the Circuit Court of the county by his name of office as obligee in a sum not less than the present value of the assets of such assignor . . . ."

The garnishee defendants (hereinafter for the sake of brevity termed "the defendants") however, as a bar to this action relied upon a later provision in the same section:

> "No creditor shall in any case where a debtor has made or attempted to make an assignment for the benefit of creditors or in case of insolvency of any debtor, by attachment, garnishment or otherwise obtain priority over other creditors upon such assignment being for any reason adjudged void or in consequence of any sale, lien or security being adjudged void under the provisions of this act. And in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all creditors of such insolvent debtor under the direction of the court by the assignee or any receiver of said property and estate appointed as hereinafter provided."

The Supreme Court of the State of Wisconsin in sustaining the defendant's position held valid those portions of the Statute regulating voluntary assignments including the quoted portion of Section 128.06.

The case arose on plaintiff's affidavit in garnishment and the defendant's answer thereto, the plaintiff having moved for judgment on the pleadings. We mention this because the appellant has set forth in her brief various allegations made by her in her garnishee affidavit which are stated to have been admitted. Certain of these allegations (set forth on pages 4 and 5 of appellant's brief) are nothing more than legal conclusions as to the force and meaning of the Statute (Chapter 128) and are therefore not admitted under the Wisconsin practice. *State ex rel Johnson* v. *Nye,* 148 Wis. 659, 135 N. W. 126.

The further allegation that the assignment was made by the debtor corporation *while insolvent* is, we take it under the pleadings, denied. The garnishee affidavit following the form usual in Wisconsin recites that the action is founded upon express contract, recites the amount of the plaintiff's claim and recites that the garnishee defendants are jointly indebted to and have property real and personal in their possession and under their control belonging to the principal defendant. There then follow elaborate allegations with respect to the making of the assignment among which appears an allegation of the insolvency of the Joseph M. Boyd Company. The affidavit and answer in garnishment states that the garnishee defendants are in no manner and upon no account whatever indebted to the defendant Joseph M. Boyd Company unless an indebtedness exists under certain facts and circumstances which are then set forth in detail. These facts and circumstances relate to the making of the assignment in question. Nowhere is there any admission or statement with reference to either the solvency or insolvency of the Joseph M. Boyd Company. In view of these allegations and in view of the fact that the garnishee affidavit expressly denies any indebtedness except and only in the event that an indebtedness exists under the facts there set forth, we take it on any fair interpretation of the pleadings and in view of the fact that the case arose on a motion for judgment on the pleadings, that the allegation of insolvency on the part of the principal debtor stands denied. *Madregano* v. *Wisconsin Gas and Electric Co.*, 181 Wis. 611, 195 N. W. 861.

Subsequent to the commencement of this action an amended assignment was executed by the debtor corporation. In our view of the case the terms of this amendment are for the purposes of this argument immaterial. The amended assignment, however, may be found on pages 18 to 24 inclusive of the Record.

The assignment authorized the sale of assets upon credit and gave the assignees the authority to conduct and continue

the business and to postpone the sale and collection of the property for such time as was consistent with reducing the same to money until the same could be wisely done (R. 22). The assignment also limited the liability of the trustees to cases of loss resulting through their own wilfull default (R. 23). It was asserted by the plaintiff that these provisions voided the assignment as a common law assignment apart from the Statute.

Decision of the Supreme Court in this Action.

The Supreme Court of the State held the assignment was an attempt to make an assignment for the benefit of creditors (R. 51). The court did not hold as stated by counsel at page 18 of their brief that the assignment was not a common law assignment but expressly refused to pass on this question and on the validity of the assignment as an assignment at common law, holding such a determination unnecessary in their view of the case. The court held that those provisions of Chapter 128 relating to voluntary assignments are properly severable from the remaining portions of the chapter and that so severed, they are not in conflict with the Federal Bankruptcy Act (R. 51). The court stated:

> "We conclude, therefore, that the provisions of Chapter 128 relating to voluntary assignments for the benefit of creditors are properly severable from the remaining sections of said chapter; that so severed they are not in conflict with the Federal Bankruptcy Act; that an assignment for the benefit of creditors is an act of bankruptcy and all proceedings in the state court might be superseded by the Federal Bankruptcy Act when the jurisdiction of the Federal Court is properly and in a timely manner invoked" (R. 51).

The court also stated that Chapter 334 of the Laws of 1897 (containing the prohibition against garnishment hereinbe-

fore referred to) constitutes a valid enactment barring a recovery by the plaintiff in this case. The court continues:

> "That Chapter 334 of the Laws of 1897 constitutes a valid enactment and barred the plaintiff herein from bringing a garnishment action against the assignee even though the assignment would otherwise be void but for such saving clause" (R. 51).

Issues Raised by the Appeal

The issues in this court are simple. The action is one of garnishment and garnishment has been repeatedly held to be a statutory remedy. *Commercial Investment Trust Company* v. *William Frankfurth H. Company,* 179 Wis. 21, 190 N. W. 1004; *Lehner* v. *Rudinger,* 185 Wis. 464, 201 N. W. 748. The Statute is harsh and must be strictly adhered to. *Lehner* v. *Rudinger, supra; Bates* v. *Milwaukee & St. Paul R. Company,* 60 Wis. 296, 19 N. W. 72.

Here Section 128.06 Wisconsin Statutes expressly prohibits garnishment in the case of an assignment for the benefit of creditors for any reason being adjudged invalid. There is on the face of it nothing involving a federal question about this provision and the plaintiff's claim is reduced to the proposition that because this provision came into being as a part of Chapter 334 of the Laws of 1897 (hereinafter more particularly set forth) and is incorporated in Chapter 128, an enactment assuming to regulate voluntary assignments, it must fall.

With this statutory situation and in view of the decision of the Supreme Court of the State of Wisconsin with reference to the severability of the Chapter the most that can be required of the defendants is to sustain those portions of the chapter contained in Sections 128.01 and 128.06 inclusive, regulating voluntary assignments.

In the event, however, that for any reason the entire chapter should be condemned, then the defendant's position is still sound if the assignment is valid as a common law assignment apart from the Statute. This we take it is a non-federal question not properly for the consideration of this court.

We also take the position in this case that the court should not lend its aid to the plaintiff in these actions where the plaintiff is seeking to accomplish ends inconsistent with that equality among creditors which laws have always designed to secure. *Boese* v. *King,* 108 U. S. 379. This thought will hereinafter be more fully developed.

The issues in this court, then, are two-fold:

1. Are those portions of Chapter 128 dealing with the regulation and administration of voluntary assignments for the benefit of creditors and including the prohibition of garnishment contained in Section 128.06 valid, and

2. In any event should the court lend its aid to the plaintiff in this action?

ARGUMENT

I.

HISTORY OF THE LEGISLATION

The Court in this and other Cases Reviewed the History of the Legislation.

In determining that those portions of Chapter 128 regulating voluntary assignments were severable from other portions of the act, the state court gave careful consideration to the legislative history of the enactment. The matter had already been considered at some length in the case of *Voluntary Assignment of Tarnowski,* 191 Wis. 279, 210 N. W. 836.

Upon this legislative history, its decision seems to have largely turned. The court stated:

> "A careful consideration of all of the acts of the legislature which are now incorporated into Chapter 128 of the Statutes reflects the clear intention of the legislature to provide for two separate and distinct proceedings, one relating to assignments for the benefit of creditors and the other relating to the discharge of insolvent debtors. In view of the recent review by this court, of the several enactments leading up to Chapter 128 as it now exists, we content ourselves by referring to the opinion in the Tarnowski case. There exists in our minds no question as to the plain duty of this court to construe the several provisions of Chapter 128 relating to assignments for the benefit of creditors as separate and distinct from the other provisions of said chapter relating to the discharge of insolvent debtors."

Independent of Chapter 128 and antedating it, Wisconsin has at all times had a true Insolvency Law.

The legislative history as outlined by counsel at pages 6 to 12 inclusive of their brief is correct as far as it goes, but it leaves entirely out of consideration the fact that since as early as 1848 Wisconsin has had not only a statute providing for the regulation and administration of voluntary assignments, but also a statute in terms denominated an insolvency act and dealing with the administration of the estates of insolvents. This statute dealing with proceedings in insolvency and providing for the administration of estates of insolvents and the discharge of insolvent debtors is clearly in conflict with the Bankruptcy Act and has been superseded by that act. It is significant, however, that this statute has paralleled the statute here under consideration dealing with the regulation and administration of voluntary assignments for the benefit of creditors, and even now appears in the Statutes of the state as Chapter 335.

The presence of that insolvency law takes all meaning from the argument made by plaintiff's counsel at page 20 of their brief for they there assert that those enactments dealing with voluntary assignments, being complete prior to 1898, the date of the present Bankruptcy Act, evidence an intention on the part of the legislature to treat them as bankruptcy laws and a substitute for the Federal Act. The conclusion is just the other way when it is realized that side by side with these measures regulating voluntary assignments, the state had during this whole period a complete insolvency law which had force and purpose and took the place of the Bankruptcy Act. Undoubtedly this fact was persuasive in leading the court to hold as it did that the original statutes dealing with voluntary assignments did not relate to "the subject of bankruptcies".

Chapter 128 is the outgrowth of Chapter 80 of the Laws of 1878; that Chapter with amendments through 1885 comprised a comprehensive scheme for the regulation of Voluntary Assignments.

In 1878, Chapter 80 was introduced into the Statutes. This chapter dealt with the regulation of voluntary assignments. In the Statutes of that year it appears headed "Of Voluntary Assignments" and what is now Chapter 335 and has just been referred to as an insolvency law appeared as Chapter 179 headed "Of Proceedings in Insolvency". Chapter 80 comprises ten sections containing the meat of what are now Sections 128.01, 128.06 (without the present saving clause) and Sections 128.11 to 128.18 inclusive. In 1882 by Chapter 170 of the laws of that year, Chapter 80 was amended so as to add a new section containing the substance of what is now Section 128.04. In 1883 two new sections were added to the chapter. These sections contained what is now the substance of the last sentence of Section 128.02 and the whole of Sec-

tion 128.03. In 1885 an additional section was added to the statute containing substantially what is now Section 128.05, and by a separate enactment in the same year the substance of the last portion of what is now Section 128.16 dealing with priorities was also added.

Now at this time then, namely the close of the year 1885 we had a comprehensive scheme contained in the statute law of the state providing for the administration and regulation of voluntary assignments for the benefit of creditors under the supervision and direction of the circuit courts. The statute as it then existed provided that the Circuit Judge should have supervision of proceedings in voluntary assignments (now Section 128.01); it invalidated preferences (now Section 128.02); it prescribed the powers of the assignee and authorized him to proceed to set aside preferences (now Section 128.03); it provided that the assignee in such a proceeding should stand in the shoes of the creditors and it provided the conditions upder which a creditor might bring an action to set aside a fraudulent conveyance (now Sections 128.04 to 128.05); it provided that voluntary assignments should be void as to creditors unless the assignee should give a designated bond (now Section 128.06); it indicated the manner in which the assignee might assent to the assignment (now Section 128.12); it required the assignor to make an inventory and to give notice to creditors, for hearings upon claims and the order of priorities and distribution to creditors (now Sections 128.13 to 128.16 inclusive); and it provided for the manner in which the assignee should settle his accounts and authorized the judge to remove an assignee upon the application of a majority of the creditors and for the appointment of a new assignee (now Sections 128.17 and 128.18).

This statute neither compelled nor authorized assignments but only prescribed a mode by which the trust created should be enforced. It provided for the security of the creditors by requiring a bond from the trustees for the discharge of their

duties. It required them to file statements showing what property had come into their possession and what they had done with the property and afforded various ways and means of compelling them to carry out the purpose of the conveyance. What was said of the statute of the State of Ohio regulating voluntary assignments, in the case of *Mayer* v. *Hellman*, 91 U. S. 496, might equally be said of this statute as it stood in 1885.

> "There is nothing in the act resembling an insolvent law, it does not discharge the insolvent from arrest or imprisonment; it leaves his after acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision."

The case of Winner v. Hoyt, 66 Wis. 227, 28 N. W. 380; Reasons for the addition of the saving clause in 1897.

This being the statutory situation, the court was concerned in the case of *Winner* v. *Hoyt*, 66 Wis. 227, 28 N. W. 380, decided in 1886, with a case where an assignment for the benefit of creditors had been made in good faith but the provisions of Chapter 80 with reference to the filing of a bond had not been complied with. Because of the clear and unequivocal provisions of the statute, making void an assignment executed in the manner in which that assignment was executed, the court sustained an intervening garnishment similar to that in the case at bar.

Eleven years later, the legislature further amended the chapter with the express purpose of correcting the inequitable result in the case of *Winner* v. *Hoyt*, and of assuring to creditors an equitable and pro rata distribution of assets so that one creditor might not as in the case of *Winner* v. *Hoyt*

secure a preference over others. This amendment, together with another amendment of an existing section, contained in Chapter 334 of the Laws of 1897, involved an amendment of what is now Section 128.06 so as to add thereto the saving clause hereinbefore set forth and relied upon by the respondents in this case. The Supreme Court of Wisconsin has used this language in speaking of that Chapter:

> "We can entertain no doubt that this legislation was aimed directly at the rule laid down in *Winner* v. *Hoyt*, *supra*, and following cases, that property attempted to be conveyed by a void voluntary assignment could be seized by any individual creditor by attachment or garnishment. Indeed these words are too plain to invite or permit an attempt to construe it upon that subject. We can but enforce it." *Gilbert Paper Company* v. *Whiting Paper Company*, 123 Wis. 472, 102 N. W. 20. See also *Plewa* v. *St. Josaphats Congregation*, 153 Wis. 276, 141 N. W. 267; *Mayfield Woolen Mills* v. *Goodrich and Martineau Company*, 189 Wis. 406, 207 N. W. 554.

Chapter 334 of the Laws of 1897 also created machinery by which creditors might initiate proceedings.

This chapter likewise added four new sub-sections to the statute, the substance of these new sections being now contained in Sections 128.07 to 128.10 inclusive. The new sections added create machinery by which creditors may initiate proceedings against an insolvent debtor who has given any creditor a preference, in which proceedings the court shall appoint a receiver and distribute the debtor's property pro rata among his creditors. These new sections added by the chapter introduce an element into what was then Chapter 80, somewhat foreign to its original purpose and bearing no relation to a statute regulating voluntary assignments.

Meanwhile in 1889 the Legislature added a Chapter dealing with the discharge of assignors.

Now in the interim in 1889 and by Chapter 385 of the laws of that year, there was written into the statutes a provision for the discharge of a debtor who had made a voluntary assignment for the benefit of creditors. That Chapter added to the statutes several new sub-sections containing the substance of what are now sections 128.19 to 128.29 inclusive. In that year when the statutes were printed, the amendments of 1889 were embodied in the statutes as Chapter 80A a separate enactment from Chapter 80 which contained all of the laws regulating voluntary assignments. In the statutes of that year, Chapter 80 was entitled: "Of Voluntary Assignments" and Chapter 80 A was entitled "Of the Discharge of Assignors". In 1898, subsequent to the amendment of 1897 containing the saving clause which we rely upon, for the first time do we find these two separate enactments grouped together in the statutes. There the entire chapter denominated Chapter 80 is entitled "Of Voluntary Assignments". We find, however, that even there those sections added by the Laws of 1889 although included in the chapter, bear a separate heading entitled "Discharge of Assignors".

The Amendments of 1897 were Germane only to the Original Act and did not Relate Either to Chapter 80A or other Portions of Chapter 334, Laws of 1897.

Now it is to be borne in mind that the amendment of 1897 containing the all important saving clause enacted to meet the situation presented in the case of *Winner* v. *Hoyt, supra,* was an amendment of Chapter 80 and not of Chapter 80 A and became a law at a time when the discharge features enacted in 1889 were incorporated in a separate chapter of the statutes. And the subject matter of the 1897 *amendment*

dealt solely with the administration of voluntary assignments and not the discharge of insolvents; was germane to Chapter 80 and not to Chapter 80 A.

The amendment of 1897 as we have pointed out consisted in the making of two changes in the existing law and the addition of four new sections. What is now Section 128.02 was amended so as to provide among other things that liens obtained in contemplation of insolvency or the making of an assignment within a limited period prior thereto should be void under certain circumstances, and what is now Section 128.06 was amended by the insertion of the saving clause here attacked. This clause ameliorated against the harsh rule of the section as it existed at that time and as we have pointed out was especially inserted to prevent the inequitable result reached in *Winner* v. *Hoyt, supra.* Both *amendments* were proper provisions with respect to voluntary assignments and related only to voluntary assignments. Both amendments dealt only with the administration of property transferred by an attempted assignment for the benefit of creditors. The new sections added by the same chapter creating as they do machinery for the winding up of the estate of an insolvent, similar to the machinery provided for the winding up of the property of a corporation in sequestration proceedings by Chapter 286 of the Wisconsin Statutes, was foreign to the original enactment. The context of the 1897 amendment to Section 128.06 obviously related to the matters covered by the earlier enactment and fell logically into the scheme of that enactment and bore no relation either to the discharge feature introduced in 1889 or the involuntary features introduced in other portions of the 1897 enactment.

With this legislative history before it, the highest court of the state very properly concluded that the present Chapter 128 is made up of two legislative acts, one dealing with the regulation and administration of voluntary assignments for the benefit of creditors and the other containing the elements

of an insolvency law, and that the field covered by the original enactment includes what is now Section 128.06 *with the saving clause* here attacked.

Contentions in the State Supreme Court with Respect to the Severability of the Saving Clause from other Portions of Chapter 334, Laws of 1897.

Counsel contended before the Supreme Court of the state as they do here that that portion of the 1897 amendment containing what is now Sections 128.07 to 128.10 inclusive and providing as it does for an equitable distribution of a debtor's property under certain circumstances despite the fact that no voluntary assignment has been made is an insolvency law and that therefore other portions of the amendment including the *saving clause* are invalid. We urged upon the court the view that a consideration of those sections was unnecessary in view of the fact that the amendment of the then existing Section 1694 (now Section 128.06) by the addition of the saving clause was an entirely independent matter germane only to a law dealing with the administration of voluntary assignments, not inter-related to or inter-dependent with the new sections added and in itself perfectly proper. We called the court's attention to the established principal of statutory construction that although some of the provisions of a statute may be unconstitutional or invalid, yet if the provisions that are proper are capable of being executed independently of those which are invalid, then the valid part may become operative unless it appears that the legislature intended that they should all be carried into effect as a whole and as conditions and compensations for each other. *Lynch* v. *Steamer "Economy"*, 27 Wis. 69. Stated in another way, that an entire statute is not void merely because some parts thereof are void, unless the void parts cannot be separated from the valid ones or were enacted as a compensation for the invalid ones

or unless the valid parts would not have been enacted except in conjunction with the void ones. *Brittingham Hixon Lumber Company* v. *Sparta*, 157 Wis. 345, 147 N. W. 635. We further called the court's attention to a long list of cases in which parts of a single enactment had been held separable and proper despite the invalidity of other parts of the same enactment.

II.

THE STATE COURT'S CONSTRUCTION OF THE CHAPTER WITH RESPECT TO THE QUESTION OF THE SEVERABILITY OF THE SAVING CLAUSE MAKES UNNECESSARY A CONSIDERATION OF THE VALIDITY OF CHAPTER 334, LAWS OF 1897, IN ITS ENTIRETY; THAT CONSTRUCTION IS BINDING UPON THIS COURT.

With this legislative history before it, the court clearly determined that the statute was severable. No further contention can be made with respect to the discharge features appearing in the statute for these have been lopped off by the state court. Now with respect to those portions of Chapter 334 of the Laws of 1897 bringing into the statute a new scheme for the initiation of proceedings by creditors, the court's decision is not as plain as it might have been. The court said:

> "That Chapter 334 of the Laws of 1897 constitutes a valid enactment and barred the plaintiff herein from bringing a garnishment action against the assignees, even though the assignment would otherwise be void but for such saving clause." (R. 51).

But also the court said:

> "We conclude therefore that the provisions of Chapter 128 *relating to voluntary assignments for the benefit of creditors* are properly severable from the remaining sections of said chapter." (R. 51).

When it is considered however that the court was not dealing with any portion of the 1897 Act except the saving clause, that section alone being drawn into question, and in view of the court's clear pronouncement as to severability, we submit that the court's reference to Chapter 334 was a reference to the saving clause and nothing else. We submit that the decision read as a whole draws the line between those portions of the act *relating to voluntary assignments for the benefit of creditors* and all other portions of the act. We submit that the court intended to and did declare the saving clause to be a portion of the statute relating to voluntary assignments and severable from all other portions of the statute including the additions made by Chapter 334, Laws of 1897.

We take this position at this time because we believe it to be the only fair interpretation of the state court's decision and because this brief is addressed to a consideration of the statute as we believe the state court has construed it. At pages 50 and 51 of counsel's brief, the validity of Chapter 334 of the Laws of 1897 is discussed and counsel reach the conclusion that that chapter constitutes an insolvency law. In view of the holding of the state court however this discussion and similar arguments made elsewhere in the plaintiff's brief are beside the point.

Even if the court should deem our interpretation of the state court's decision erroneous, however, the argument we have attempted to develop in this brief establishes that the statute is invalid. In fine, it is our position that the state court has determined the severability of the saving clause not only from all discharge features of the statute but also from

the *additions* made, as distinct from the *amendments* contained in Chapter 334, Laws of 1897; that this court considers only the statute as construed by the state court; but that in any event and even if the statute be construed to include *all* of Chapter 334, Laws of 1897, it is nevertheless valid.

The Construction of the statute by the state court is final; this court examines the statute as construed by the state court.

While the decision of the state court as to the validity of the statute is not binding upon this court and the court will look beyond the name and label that the state court affixes to the statute, it is equally well settled that the task of determining the intention of the state legislature as to the severability of various doubtful portions of the enactment rests primarily upon the state court and its decision is conclusive upon this court. *Dorchy* v. *Kansas*, 264 U. S. 286; *Clyde* v. *Gilchrist*, 262 U. S. 94. This is merely an application of the familiar principle that while the characterization of a statute by the state court as distinct from its construction is not binding upon this court, the construction of the statute by the state court is binding; the Supreme Court will only examine into the operation of the statute *as construed* by the state court. *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *Truax* v. *Corrigan*, 257 U. S. 312; *Quong Ham Wah Company* v. *Industrial Accident Commission*, 255 U. S. 445; *Corn Products Refining Company* v. *Eddy*, 249 U. S. 427.

III.

RESPONDENT'S POSITION WITH RESPECT TO THE GENERAL PRINCIPLES APPLICABLE IN CONSIDERING THE VALIDITY OF THE CHAPTER.

The State Supreme Court Clearly Recognized the Supremacy of Congress in the Field of Bankruptcies.

The settled principle that Congress has preempted the field of bankruptcies and state insolvency laws are thus superseded was clearly recognized by the court in the case at bar. The court stated:

> "No doubt can longer exist that all state insolvency laws which provide for the discharge of insolvent debtors are suspended during the existence of the Federal Bankruptcy Act. If a state law is an insolvency law, the authorities are all to the effect that such law is suspended and wholly superseded by the Federal Bankruptcy Act." (R. 43).

And again:

> "We have no thought or intention of questioning the right of Congress to occupy exclusively the bankruptcy field but we fail to find any provision of the Bankruptcy Act or any decision of the United States Supreme Court construing it, which forbid voluntary assignments for the benefit of creditors, when not superseded by bankruptcy proceedings." (R. 49).

Article I, Section 8 of the Constitution contains a grant of power to Congress "to establish uniform laws on the subject of bankruptcies." We do not for a moment dispute the familiar principle that Congress having carried into effect the grant by the enactment of a bankruptcy law, has indi-

cated an exclusive purpose to preempt the field and that the field is no longer open for state legislation and state laws that are "bankruptcy laws" or as the courts have more frequently said "insolvency laws" are suspended. We meet counsel squarely upon the narrow issue: Do those portions of Chapter 128, Wisconsin Statutes, relating only to voluntary assignments for the benefit of creditors and including section 128.06 (bearing in mind that the highest court of the state has judicially found the independence of such portions of the chapter from the balance) constitute an insolvency law?

The Statement that the Ratable Distribution of a Debtor's Estate among his Creditors is the Essential Feature of a Bankruptcy Act is Questionable.

Counsel have collected numerous cases in their brief and have included numerous quotations directed to the proposition that the essential element of a bankruptcy law is the distribution of an insolvent's estate among his creditors and not the discharge of a debtor from his debts. They draw from this the conclusion that because the assignment features of Chapter 128 contain provisions for the distribution of the estate of the assignor among his creditors, that chapter is an insolvency law and is, therefore, void. We will not quarrel with counsel upon the basic premise although it is at least seriously questionable for the following reasons:

1. It is quite true that the earliest forms of bankruptcy laws as for example the Roman law did not include provisions for discharge of the debtor but solely provisions for the distribution of his estate, but at the time of the adoption of the constitution the bankruptcy laws of England from whom we took our system of jurisprudence contained and had for many years contained provisions for the discharge of debtors. See Queen Anne's Act of 1705; *Blackstone's Com-*

mentaries, Book II, Chapter XXXI. And all bankruptcy legislation enacted by Congress pursuant to the constitutional grant has contained as an essential feature provisions for the discharge of the debtor.

2. It is also true as stated by counsel that many text writers have adverted to the matter of distribution as being the essential feature of bankruptcy laws. But it is equally true that courts and among them this court have repeatedly declared the discharge of the debtor to be one of the essential features of a bankruptcy law. *Stellwagen* v. *Clum,* 245 U. S. 605; *In Re: Watts,* 190 U. S. 1; *Voluntary Assignment of Tarnowski,* 191 Wis. 279; *Star* v. *Johnson,* (Tex.) 44 S. W. (2nd) 429.

In any Event several Elements go to make up a Bankruptcy Law; Bankruptcy Laws are Characterized by Provisions for the Ratable Distribution of the Debtor's Estate, by Provisions for the Discharge of the Debtor, by the Fact that they Relate Primarily to Insolvent Debtors, and by the Existence of Provisions for Involuntary Action against the Debtor.

We will not quarrel with counsel as to the validity of the premise but we do most vigorously dispute the conclusion that counsel reach based upon this premise. The truth is that several elements go to make up a bankruptcy law as England understood the term in 1705 and as we understand it today. As counsel state the distribution of the debtor's estate ratably among his creditors is one of the essential elements of a bankruptcy law—perhaps the most essential element. But the granting of a discharge to the debtor is as we have pointed out, also an essential element of bankruptcy laws. And equally essential is the fact that bankruptcy laws relate to *insolvent* debtors and the distribution of their estates and are not primarily concerned with the distribution

of the estates of solvent debtors. *Remington on Bankruptcy*, Section 2110; *Pope* v. *Title Guaranty & Surety Company*, 152 Wis. 611, 140 N. W. 348; *International Shoe Company* v. *Pinkus*, 278 U. S. 261; *In Re: Weedman Stave Company*, 199 Fed. 948. In the last case cited, the court said:

> "The elements of an insolvency law are *insolvency*, surrender of property, its administration by a receiver or trustee, distribution of the assets among the creditors and a provision for priorities or other matters not permissible in the absence of such a statute." Page 950.

In the case of *International Shoe Company* v. *Pinkus*, this court stated:

> "The distribution of property of *insolvents* for the payment of their debts and providing for their discharge or that otherwise relate to the subject of bankruptcies are within the field entered by congress when it passed the Bankruptcy Act and, therefore, such provisions must be held to have been superseded." Page 266.

Equally essential to the idea of a bankruptcy law is the element of *compulsion*. If the essential element is as counsel says the ratable distribution of a debtor's property among his creditors it would seem to follow as a corollary that such a ratable distribution may be *forced* by the creditors. As Remington expresses it:

> "In order for a system to amount to a bankruptcy system, it must provide machinery *for throwing a debtor into insolvency involuntarily* and for completely administering his assets, and that if the system does so operate, then it is a bankruptcy system." *Remington on Bankruptcy*, Section 2110.

How many of these characteristics must be present before an enactment will be held to constitute an invasion of the field of bankruptcies, has never been expressly stated. We can

conceive perhaps of an enactment constituting a "bankruptcy act" although no provision for discharge is present. But equally the mere fact that the single element of the ratable distribution of a debtor's property among his creditors is present does not condemn legislation as within the prohibition. This has been well stated by the court in the very recent case of *Straton* v. *New*, 283 U. S. 318, a case strongly relied upon by the appellant. The court there said at page 327:

> "It was pointed out in *Stellwagen* v. *Clum, supra*, that state laws which provide for sale and distribution of a debtor's property may not amount to insolvency laws; and it was there held that such laws, if not inconsistent with the administration of the Bankruptcy Act, are available to litigants. Appellees must, therefore, show that the statutory action in the state court is in fact an insolvency proceeding. The certificate states no facts which lead to such a conclusion, nor does it so denominate the creditor's suit. Reference to the statutes of West Virginia of which we take judicial notice, demonstrates that it is not in that category."

To the same effect, see *Stellwagen* v. *Clum*, 245 U. S. 605; *Mayer* v. *Hellman*, 91 U. S. 496; *Star* v. *Johnson* (Tex.), 44 S. W. (2nd) 429; and *Hammond* v. *Lyons Realty Company*, 59 Fed. (2nd) 592 (C. C. A. 4th Cir.).

The Constitutional Grant must be Reasonably Interpreted; Ancient and Well Recognized Proceedings of the Character here Involved ought not to be Stricken Down and Weight Should be Given to the Practical Construction of the Wisconsin Act by the Good Faith Use of it in Reliance Upon the Many Wisconsin Decisions.

In every case in which the question arises it would seem to us that the legislation in question must be carefully examined bearing in mind all these various significant elements that go to make up what we know as a bankruptcy law. Up-

on the presence or absence of these various elements giving due weight to the interpretation of the enactment by the courts of the state involved, the decision must turn. The interpretation of the constitutional grant and its application must be reasonable however and must have some regard to business and economic exigencies. As this court states in the case of *International Shoe Company* v. *Pinkus, supra,* the national purpose to establish uniformity must be borne in mind. States ought not to be permitted to pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations. But on the other hand, ancient, expeditious and well recognized proceedings such as voluntary assignments for the benefit of creditors, which have proved of great value to insolvent debtors, debtors not actually insolvent but in financial stress, and to creditors, should not be struck down. See the opinion of the Supreme Court of Wisconsin in this case (R. 49).

So broad a construction should not be given to the language of the constitutional grant as to wipe out numerous legislative enactments having as their object the protection of debtors and creditors, merely because of the presence of the single element "ratable distribution to creditors."

In Wisconsin as in many other states, provisions have been made for the distribution of corporate estates in sequestration proceedings, irrespective of the solvency or insolvency of the debtor, *Chapter 286, Wisconsin Statutes;* for the administration of specific property of a debtor in proceedings supplementary to execution, *Chapter 273, Wisconsin Statutes;* and for the marshalling of assets within the broad equitable powers of the court, as well as for the regulation of voluntary assignments for the benefit of creditors. We submit that remedial legislation of this character should not be condemned unless it can be said that, having in mind the various elements of bankruptcy laws hereinbefore set forth, the legislation contains so many features common to bankruptcy laws

as to constitute in a real sense bankruptcy legislation. In this connection, it should be borne in mind that, in Wisconsin at least, numerous assignments for the benefit of creditors have been made and are now being administered, numerous sequestration actions are pending, and numerous proceedings of this general character have been initiated in perfectly good faith and in the belief that they are proper. This belief has doubtless been engendered by the following current of authority: *In Re: Voluntary Assignment of Tarnowski,* 191 Wis. 279, 210 N. W. 836; *Binder* v. *McDonald,* 106 Wis. 332, 82 N. W. 156; *Garden City Bank and Trust Company* v. *Geilfus,* 86 Wis. 612, 57 N. W. 349; *Segnitz* v. *Garden City Company,* 107 Wis. 171, 83 N. W. 327; *Duryea* v. *Muse,* 117 Wis. 399, 94 N. W. 365; *Hazelwood* v. *Olinger Building Department Stores,* 205 Wis. 85, 236 N. W. 349. Here is a practical construction that should not be overlooked.

Wisconsin Decisions Prior to This Case.

This case does not represent a new departure for the State of Wisconsin. It involves perhaps phases of the question not passed upon heretofore but the least that can be said is that it is the logical culmination of a uniform current of authority. Voluntary assignments have long been recognized in Wisconsin and the Wisconsin Supreme Court has on several occasions pointed out that Chapter 128 as well as other chapters upon the subject are merely regulatory. *Mayfield Woolen Mills* v. *Goodrich and Martineau Company,* 189 Wis. 406, 207 N. W. 554. That court has also stated that unless prohibited by statute, the right to make a voluntary assignment is inherent in a corporation and exists independently of Chapter 128. *Binder* v. *McDonald, supra.* See also *Klauber* v. *Charlton,* 47 Wis. 564, 3 N. W. 443; *Wadleigh* v. *Merkle,* 57 Wis. 517, 15 N. W. 838. In *Holton* v. *Burton,* 78 Wis. 321, 47 N. W. 624, the court having occasion to consider the provi-

sions of the statute with reference to voluntary assignments subsequent to the amendments of 1889 characterized the law as an insolvent law. Shortly thereafter, however, this characterization was criticized and as early as the case of *Binder* v. *McDonald, supra,* the court recognized the separability of what was then Chapter 80 A dealing with the discharge of assignors from the original enactment embodied in Chapter 80.

The court again adverted to the separability of these portions of the enactment in the case of *Segnitz* v. *Garden City Company,* 107 Wis. 171, and approved that portion of Chapter 128 containing measures regulating voluntary assignments, including section 128.06 with its saving clause while at the same time condemning that portion of Chapter 128 containing discharge features, as an invasion of the field of bankruptcy.

The interpretation placed upon the statute in the Segnitz case was reenunciated in the case of *In Re: Voluntary Assignment of Tarnowski,* 191 Wis. 279, where the court used this significant language:

> "The discharge of the bankrupt from his debts constitutes the very essence of the bankruptcy law. While the administration of the estate of the bankrupt and the distribution of the proceeds thereof pro rata among his creditors is a usual, if not a necessary incident of a bankruptcy law, the discharge of the debtor from his debts is no part of an assignment law. The winding up and a fair and equal distribution of the estate of insolvent debtors may arise in various ways, but where such a proceeding does not result in the discharge of the insolvent debtor, statutes regulating such a proceeding do not conflict in any manner with the bankruptcy law, and it has been squarely held by the Supreme Court of the United States that such laws are not superseded by the National Bankruptcy Act." (Page 285).

This court has apparently approved the interpretation placed upon the Wisconsin Statute by the Wisconsin Supreme Court.

It is of significance that the interpretation given Chapter 128 by the Wisconsin court in the case of *Segnitz* v. *Garden City Company, supra,* has apparently met with the approval of this court for that case was cited by this court in the recent case of *International Shoe Company* v. *Pinkus, supra,* with approval. While in the *Segnitz* case, the court did not deal squarely with the issue here presented, the court was there confronted with an interpretation of the statute and it did hold valid that portion of Chapter 128 containing measures regulating voluntary assignments *including section 128.06 with its saving clause,* while at the same time condemning that portion of Chapter 128 containing discharge features, as an invasion of the field of bankruptcy.

Federal cases considered; these cases indicate a line of cleavage between cases arising under general insolvent statutes as in International Shoe Company v. Pinkus, 278 U. S. 261, and cases arising under statutes regulating general assignments for the benefit of creditors as in Mayer v. Hellman, 91 U. S. 496.

The line between bankruptcy laws and legislation regulating voluntary assignments has been just as sharply drawn by this court and inferior federal courts. *Mayer* v. *Hellman,* 91 U. S. 496; *Boese* v. *King,* 108 U. S. 379; *In Re: Watts,* 190 U. S. 1; *Randolph* v. *Scruggs,* 190 U. S. 533; *Stellwagen* v. *Clum,* 245 U. S. 605; *International Shoe Company* v. *Pinkus,* 278 U. S. 261; *Straton* v. *New,* 283 U. S. 318; *In Re: Sievers,* 91 Fed. 366. See also *Old Town Bank of Baltimore* v. *Maryland,* 96 Md. 341, 53 Atl. 934; *Pelton* v. *Sheridan,* 74 Ore. 176, 144 Pac. 410; *Star* v. *Johnson,* (Tex.), 44 S. W. (2nd) 429, affirmed 47 S. W. (2nd) 608.

These cases represent an unbroken current of authority and the principle which distinguishes between cases arising under general insolvent statutes and cases arising under statutes regulating assignments for the benefit of creditors remains firmly entrenched in the reports of this court. In the last case cited, *Star* v. *Johnson,* the court aptly declared:

> "It is very evident that there are two distinct lines of decisions—one involving cases arising under general insolvent statutes, as in the *Pinkus* case, and the other involving cases arising under statutes permitting general assignments for the benefit of creditors, as in *Mayer* v. *Hellman, Boese* v. *King, Randolph* v. *Scruggs,* and *Stellwagen* v. *Clum, supra.* These cases are easily distinguished as was shown *In Re: Sievers,* (D. C.) 91 F. 366, 168, in the following language: 'Concerning these different contentions, it appears to me that there is a substantial difference between a proceeding under a general insolvency statute and one under a statute permitting general assignments. The one administers upon the estate of an insolvent as a proceeding in the courts, derives its potency from the law, winds up the estate judicially, and discharges the debtor. Such is essentially a proceeding in bankruptcy, and such is undoubtedly superseded by the Act of Congress in question * * *. The other derives its potency not from the law but from the contract or deed of the debtor, is administered under and according to the provisions of the deed, supplemented only by salutary legislative safeguards, and does not result in a discharge of the debtor from his obligations. This method of proceeding is not superseded by the Act of Congress in question.'" Pafe 431.

Voluntary assignments have long been recognized by this court as well as our state courts as time honored and expeditious proceedings. In the case of *Randolph* v. *Scruggs,* 190 U. S. 533, the court declared:

> "The assignment was not illegal. It was permitted by the law of the state, and cannot be taken to have been prohibited by the bankruptcy law absolutely in every

event, whether proceedings were instituted or not. *In Re: Sievers,* 91 Fed. Rep. 366; *In Re: Romanow,* 92 Fed. Rep. 510. It had no general fraudulent intent. It was voidable only in case bankruptcy proceedings should be begun. At the time when it was made the institution of such proceedings was uncertain." Page 537.

The mere fact that Congress recognized the validity of voluntary assignments by providing that voluntary assignments by the debtor constitute an act of bankruptcy, should alone be sufficient to show that Congress at least did not consider assignments made by debtors to in any way constitute an invasion of the field of bankruptcy. *A fortiori* statutes merely regulating voluntary assignments would not constitute invasions of the field of bankruptcy and as a matter of logic should be proper. Counsel have cited two cases at pages 39 and 40 of their brief, not passing upon this point but containing language condemning voluntary assignments. In view of the attitude of this court upon the subject as shown in the case of *Randolph* v. *Scruggs* just referred to, it would seem that the matter is now a closed issue.

The logic behind this argument must certainly be sound because in every case where this court has considered this question, statutes regulating voluntary assignments for the benefit of creditors have been sustained. We submit that the case of *Mayer* v. *Hellman, supra,* is decisive of the issues here presented. In that case the question before the court involved the validity of an assignment for the benefit of creditors made in the State of Ohio under a statute regulating the mode of making such assignments. The court held that neither the statute nor the voluntary assignment was superseded or in any way invalidated by the Bankruptcy Act. The language of the court is so apt in its application to the case at bar that we set it forth at length here. The court said:

"In the argument of the counsel for the defendant in error, the position is taken that the Bankrupt Act sus-

> pends the operation of the act of Ohio regulating the mode of administering assignments for the benefit of creditors, treating the latter as an insolvent law of the State. The answer is, that that statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments; it assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment; it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory provision. The assignment in this case must, therefore, be regarded as though the statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that State; but the assignment in question was not made in pursuance of any of its provisions. The position, therefore, of counsel, that the Bankrupt Law of Congress suspends all proceedings under the Insolvent Law of the State, has no application." (P. 502).

Counsel has attacked this decision (appellant's brief, pages 53 and 54) on the ground that the court in passing upon the questions involved did not consider the existence of the Ohio Statute. The language of the court however cannot be minimized by any such statement, and it is very clear that the court did consider the Ohio Statute and held that the provisions thereof were not substantially other than a court of chancery would apply in the absence of a statutory provision and that, therefore, the statute was proper. It is true as counsel states that under the statute here the assignment is

void while in the *Mayer* case, the assignment was valid, but at this stage of the proceeding we are not considering the assignment but the validity of the statute itself. No argument based on the proposition that the *assignment* in this case and the procedure followed by the assignee in this case was different from the assignement in the *Mayer* case and the procedure followed there can for a moment detract from the significance of the court's decision in the *Mayer* case with reference to the character and validity of the Ohio Statute. With reference to the argument as to the invalidity of the assignment here, a further discussion will be found at page 43 of this brief.

What is said in the *Mayer* case with respect to the Ohio Statute can equally be said here. The Wisconsin Statute, stripped of the discharge features is not an insolvent law in any proper sense of the term. It does not compel or in terms even authorize assignments; it assumes that such instruments were conveyances previously known and only prescribes a mode by which the trust created shall be enforced. It provides for the security of creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property, and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the debtor from arrest or imprisonment and it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. This description of the Wisconsin Act follows almost word for word the court's characterization of the Ohio Act in the *Mayer* case.

In the case of *Stellwagen* v. *Clum, supra,* the court was again confronted with the question of whether the Ohio Statute was suspended or superseded by the Bankruptcy Act and it answered the questions propounded by the Circuit Court of Appeals in the negative, squarely holding the Ohio Statute

to be proper. While the question arose in a somewhat different manner than the question is here presented to the court, the holding is squarely to the proposition that the Ohio Statute was valid and we take it that if it is valid for one purpose, it is valid for all purposes. Now it is to be noted that these two cases together with the other cases to which we have referred and particularly the case of *Boese* v. *King, supra,* and the case of *Segnitz* v. *Garden City Company,* 107 Wis. 171, 83 N. W. 327, in which the provisions of the Wisconsin Act itself were considered, were all cited with approval in the case of *International Shoe Company* v. *Pinkus,* 278 U. S. 261. That case is the case mainly relied upon by the appellant to sustain her position here. We submit that that case does not constitute in any manner a retreat from the earlier holdings of the court nor a modification of the general principles with respect to this question of the invasion of the field of bankruptcy by state legislation. It is to be noted that the *Mayer* case and the *Stellwagen* case were not only cited with approval by this court in the *Pinkus* case but further that this court did not in any way assume to distinguish or withdraw any of the statements which it had earlier made in those cases.

We repeat, the *Pinkus* case does not represent a retreat from the earlier holdings of the court. The court dealt in the *Pinkus* case with a statute of an entirely different type from that involved in these earlier cases, and from a statute entirely different than the Wisconsin Act. In the *Pinkus* case, the court holds that a statute of the State of Arkansas denominated an insolvency law and treated as such by the Supreme Court of that state, which statute provides for the administration of the estate of insolvents and the distribution of assets to those creditors and only those creditors who consent to the discharge of the debtor, constitutes an invasion of the field of bankruptcy and is superseded by the Federal Bankruptcy Act. It is to be noted that the court treated the

coercive feature of the act with respect to discharge just as though the statute itself in terms provided for discharge. The significant distinguishing features however lie in the fact that the Arkansas Act was a single enactment, was denominated an insolvency law, and has been construed and treated by the Arkansas courts in four cases as an insolvency law. The decision is not in any sense out of line with the principles theretofore established by the same court. The act in question involved elements not present in the Wisconsin act as we will hereinafter point out in detail and the only comfort counsel can draw from the case lies in the language of the court with respect to the general subject of bankruptcy laws. While in the *Pinkus* case, the court did refer to the distribution features of winding up proceedings as one of the essential elements of an insolvency law, it did not by any means say that any law containing such features and such features alone was an insolvency law. In fact the opinion clearly indicates that other features must be present before the court will consider an act to constitute an invasion of the field of bankruptcy. In any event as the court later pointed out in the case of *Straton v. New*, 283 U. S. 318, at page 331, the language of a case must be read in connection with the facts on which it was predicated.

Counsel also relies strongly upon the case of *Straton* v. *New*. We believe that far from supporting the position of counsel the *Straton* case constitutes a repudiation of their position. In that case one Alley obtained a judgment against a coal company in a West Virginia state court, and thereafter commenced a judgment creditor's suit seeking to administer certain property of the coal company and marshall the claims of those creditors having liens against such property. More than four months thereafter, a petition in bankruptcy was filed and the question confronting the court involved the validity of the state court proceedings, and the question of whether the federal court in the bankruptcy pro-

ceedings might enjoin further action in the creditor's suit. In a lengthy opinion, the court came to the conclusion that the federal court had no power to act; that the action of the state court was proper, and that the federal court might not interfere with the action of the state court. Here again, it is to be noted that the court in its opinion reviews the earlier cases and neither retreats from nor distinguishes them but relies upon them as establishing the principles applied by the court in that case. Particularly, it is to be noted that the court cited with approval the cases of *Mayer* v. *Hellman*, *Stellwagen* v. *Clum*, *In Re: Watts*, and *International Shoe Company* v. *Pinkus*, *supra*. The *Stellwagen* case and the *Watts* case were discussed at length by the court. The gist of the opinion is to be found in the quotation from the court's opinion hereinbefore set forth at page 23 of this brief.

Counsel have referred to a number of early federal court decisions. These cases are discussed at pages 30 to 35 of counsel's brief. We do not believe that they establish the principles contended for. The case of *In Re: Weedman Stave Company*, 199 Fed. 948, involved a statute of the State of Arkansas denominated an insolvency law, applying only in the event of insolvency, applying only to corporations, containing machinery for involuntary action and the appointment of a receiver at the instance of creditors. This is in no way similar to the Wisconsin Act.

In the case of *In Re: F. A. Hall Company*, 121 Fed. 992 (D. C. Conn.), the court had under consideration a statute of the State of Connecticut. All that is said is *obiter dicta* in view of the fact that the conflict arose where a petition in bankruptcy had been filed less than four months after the initiation of the state court proceedings. What is said however has no application here because the court was there dealing with a true insolvency law having application only to insolvents, denominated an insolvency law, and containing provisions for a limited discharge and provisions for exemptions to the debtor.

The Maryland Statute was under consideration in the case of *In Re: Storck Lumber Company,* 114 Fed. 360 (D. C. Md.). Here again, the court dealt with a true insolvency law providing for the filing of petitions in insolvency and containing involuntary features. The law related only to corporations and was similar in makeup to the insolvency law appearing as Chapter 335 of the Wisconsin Statutes, which is admittedly suspended. We do not find that there was any discussion of the necessity of discharge features in the court's opinion.

In the case of *In Re: Salmon,* 143 Fed. 395 (D. C. Mo.), the court had under consideration an insolvency law of the State of Missouri applying only to banks, and containing none of the features of a statute regulating voluntary assignments.

In the case of *Hammond* v. *Lyon Realty Company,* 59 Fed. (2nd) 592 (C. C. A. 4th Cir.), the court again dealt with a Maryland Statute which had been construed by the highest court of the State of Maryland in the case of *Hughes* v. *Hall,* 118 Md. 673, 85 Atl. 946, as an insolvency law. The statute under consideration had all of the elements present in the *Pinkus* case except the element of discharge. The statute in no way resembled the statute here under consideration. It is of interest however in view of counsel's interpretation of the language of this court in the *Pinkus* case, that the Circuit Court of Appeals said this:

> "But it is argued that this view must not be accepted literally because the Supreme Court in *Stellwagen* v. *Clum* and *International Shoe Company* v. *Pinkus, supra,* has emphasized the importance *of the discharge of the insolvent* from his debts in any system of bankruptcy law." Page 594.

The only federal court case cited by counsel which really supports their position is the case of *In Re: Smith,* 92 Fed. 135 (D. C. Ind.). In that case the court does clearly hold

suspended a statute of the State of Indiana which is in reality a measure regulating voluntary assignments. It is to be noted however that the opinion is *obiter dicta* because the petition in bankruptcy was filed within four months of the making of the assignment and that the court proceeds on the mistaken assumption that the statute related only to insolvent debtors when in point of fact the statute related to debtors in embarrassed or failing circumstances. It is also to be noted that the court starts with the proposition that because the Federal Bankruptcy Act makes an assignment for the benefit of creditors an act of bankruptcy, such assignment must be void, and draws from this the conclusion that a statute regulating voluntary assignments for the benefit of creditors is invalid. This premise upon which the whole decision is based is no longer tenable of course in view of the holding of this court in the case of *Randolph* v. *Scruggs*, 190 U. S. 533. The decision cannot be good law in view of the decision of this court in the case of *Mayer* v. *Hellman, supra.* In passing we call the court's attention to the fact that the law under consideration was denominated an insolvency law.

IV.

APPLICATION OF GENERAL PRINCIPLES TO THE WISCONSIN ACT.

In applying the general principles already discussed only those portions of the act relating to voluntary assignments for the benefit of creditors need be examined; the conclusion of the state court that other portions of the act are properly severable is final.

When we come to apply the general principles discussed to the Wisconsin Statute, we find the statute contains only one of the several elements of an insolvency law. At the outset it must be noted that we are dealing with a statute stripped of the discharge features carried into it by the enactment of 1889 and the involuntary features created by the legislature in 1897. The Supreme Court of Wisconsin has determined as a matter of legislative intent and statutory construction that these parts of the chapter are separable from those portions of the chapter relating to voluntary assignments. As we have pointed out that construction is binding upon this court and this court will only examine into the operation of the statute *as construed* by the state court. *Dorchy* v. *Kansas,* 264 U. S. 286. The presence of the severed portions of the chapter may be disregarded and the act now stands as it stood in 1885 except for the *saving clause* added in 1897—an act regulating voluntary assignments for the benefit of creditors. For the convenience of the court, we have set forth in bold face type in the appendix those portions of the act dealing with voluntary assignments for the benefit of creditors.

The act has been consistently characterized by the Supreme Court of Wisconsin as an act regulating assignments for the benefit of creditors.

The state court has consistently characterized the act as a law regulating voluntary assignments for the benefit of creditors and has expressly stated that it is not an insolvency law. *Pobreslo* v. *Joseph M. Boyd Company, et al.*, 242 N. W. 725 (this case); *In Re: Voluntary Assignment of Tarnowski*, 191 Wis. 279, 210 N. W. 836; *Binder* v. *McDonald*, 106 Wis. 332, 82 N. W. 156. While we do not contend that this characterization of the act is conclusive upon this court, this court has in other cases given weight to the characterization of a statute by the highest court of the state. *International Shoe Company* v. *Pinkus, supra; Clyde* v. *Gilchrist*, 262 U. S. 94; *Ward and Gow* v. *Krinsky*, 259 U. S. 503.

Those portions of the chapter relating to voluntary assignments for the benefit of creditors and held independent of the balance of the chapter and valid, contain no elements of a bankruptcy law except the element of ratable distribution of the debtor's property among his creditors.

The act contains no provision for discharge.

As we have pointed out, the statute stands before this court substantially in the form in which it existed in 1885, divested of any discharge feature and divested of the involuntary features created in 1897. In that form, it is significant that there is no provision by which the debtor may be discharged. The act applies to both individuals and corporations. It is quite true as stated by counsel at pages 35 to 37 of their brief that the discharge of a corporate debtor is of little consequence in view of the nature of the corporate entity, where the court is considering a statute applying only to corporations as in the case of *Exploration Mercantile*

Company v. *Pacific Hardware and Steel Company*, 177 Fed. 825 (C. C. A. 9th Cir.); but where as here the statute applies equally to corporations and individuals, the absence of a discharge feature is significant. We have been unable to find a single case in which this court has ever determined invalid a state statute dealing with and providing for the ratable distribution of a debtor's property among his creditors, *where the state enactment contained no discharge feature.*

The statute applies without regard to solvency or insolvency of the debtor.

The statute has application without reference to the solvency or insolvency of the debtor. Any individual or corporation may make an assignment for the benefit of creditors irrespective of his financial condition. Here again one of the most significant features of a bankruptcy law is absent. And in passing, we again call the court's attention to the fact that the alleged insolvency of this particular debtor is denied. (See this brief, page 4).

The statute contains no provision whereby involuntary proceedings may be initiated.

Construed as we believe the Supreme Court has construed this statute, we find that it contains no provision by which it may be invoked on behalf of a creditor and against the debtor. Another of the vital characteristics of an insolvency law is absent.

The statute is in form and substance a law regulating voluntary assignments; it is called into operation by the deed of the assignor.

The statute is in form and substance a law regulating voluntary assignments. While it is perfectly true as stated by counsel at pages 13 and 14 of their brief that the *procedure* is statutory as is the *method of distribution, In Re: Voluntary Assignment of Milwaukee Sheep and Wool Company,*

186 Wis. 320, 202 N. W. 693; *Segnitz* v. *Garden City Company*, 107 Wis. 171, 83 N. W. 327; it is equally true that the proceeding derives its impetus from the debtor and its potency from the deed of assignment and not from the law. The law does not create the proceeding but merely regulates it. *Mayfield Woolen Mills Company* v. *Goodrich and Martineau*, 189 Wis. 406, 207 N. W. 554. The distinction was ably brought out in the case of *In Re: Sievers*, 91 Fed. 366. The court there said:

> "Concerning these different contentions, it appears to me that there is a substantial difference between a proceeding under a general insolvency statute and one under a statute permitting general assignments. The one administers upon the estate of an insolvent from the law, winds up the estate judicially, and discharges the debtor. Such is essentially a proceeding in bankruptcy, and such is undoubtedly superseded by the Act of Congress in question * * *. The other derives its potency not from the law but from the contract or deed of the debtor, is administered under and according to the provisions of the deed, supplemented only by salutary legislative safeguards, and does not result in a discharge of the debtor from his obligations. This method of proceeding is not superseded by the Act of Congress in question." Page 368.

Counsel have called attention to the fact that the assignment in this case was void under the statute and, therefore, take the position that at least as to this assignment, the proceeding was more or less involuntary and takes its potency from the law and not from the deed of the assignor. Counsel state at page 50 of their brief:

> "The Boyd Company by making this void assignment brought itself automatically within the provisions of that chapter. As a penalty for an act which was in effect an act of bankruptcy, the entire estate of the insolvent Boyd Company was automatically thrown into the lap

of the court to be administered by an assignee appointed by the court without any reference whatsoever to the will or wishes of the assignor."

This is not a fair statement of the situation. The only section of the statute involved here is that portion of Section 128.06 which provides that no creditor shall in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, obtain priority over other creditors by a garnishment, upon such assignment being for any reason adjudged void. It is that portion of the section which counsel must establish is invalid in order to succeed. While it is true that the statute further provides that in such cases the property of the debtor shall be administered for the ratable benefit of creditors, the administration is by the assignee. This section was not inserted in the act as a penalty for the making of the assignment but was a measure enacted for the purpose of preventing an inequity and was in the interests of the debtor as well as creditors. It was enacted so that the purpose which was sought to be accomplished by the execution of an assignment should not fail because of a defect therein. The legislature might just as well have said that the provisions with reference to the filing of a bond by the assignee and the other provisions here involved were merely directory, because the practical operation of the statute is to lend validity to the assignment so that the property may be administered for the benefit of creditors even where the procedural requirements of the section have not been met.

Voluntary assignments in some form or other have existed since the relation of debtor and creditor first arose. They were recognized by the common law at a very early time and antedated bankruptcy legislation. It has been pointed out by the courts of Wisconsin that unless prohibited by statute, the right to make a voluntary assignment is inherent in a corporation and exists independently of statute. *Binder* v. *McDonald,* 106 Wis. 332, 82 N. W. 156; *Garden City Bank and*

Trust Company v. *Geilfus*, 86 Wis. 612, 57 N. W. 349. As the State Supreme Court well said in this case:

> "We perceive in the regulatory provisions of chapter 128, Statutes, relating to voluntary assignments for the benefit of creditors many provisions which operate to the benefit of both debtors and creditors. To strike down voluntary assignments for the benefit of creditors would be to destroy ancient, expeditious and well recognized proceedings which have proved of great value not only to insolvent debtors, to debtors not actually insolvent, but in financial distress, and to creditors." (R. 49).

See also *Randolph* v. *Scruggs*, 190 U. S. 533.

The statute was never intended as an insolvency law.

This statute was never intended by the legislature to be an insolvency law. The State of Wisconsin at all times had a complete and comprehensive insolvency law, so entitled, separate and apart from this enactment. It is to be noted that in characterizing the Ohio Act with respect to voluntary assignments, this court relied upon the fact that there existed in Ohio an insolvent law. *Mayer* v. *Hellman*, 91 U. S. 496, 502.

The differences between Chapter 128 as limited and construed by the Supreme Court of Wisconsin and the Federal Bankruptcy Act are of no consequence if Chapter 128 is not an insolvent law.

Counsel have at pages 40 to 48 of their brief enumerated points of difference between the Federal Bankruptcy Act and this statute providing for the administration of voluntary assignments. We do not consider that an indictment of the statute at all; rather, it clearly illustrates the fact that we are dealing with an enactment entirely outside the field of bankruptcy and dissimilar in every respect but one—the

ratable distribution of a debtor's property to his creditors. We fully concede the necessity of uniformity *within the field of bankruptcy,* but this statute would be suspended if it invaded that field whether its provisions were coincident with or in conflict with the provisions of the Bankruptcy Act. The essential fact remains that the element of distribution alone does not make a statute an insolvency law. *Straton* v. *New,* 283 U. S. 318; *Stellwagen* v. *Clum,* 245 U. S. 605. And if the enactment is not within the field of bankruptcy, distribution may well be on a different plane and in a different manner than that prescribed by the Federal Bankruptcy Act.

V.

THE QUESTION AS TO THE VALIDITY OF THE ASSIGNMENT AT COMMON LAW WAS NOT PASSED UPON BY THE SUPREME COURT OF WISCONSIN.

When this matter was tried before the Supreme Court of Wisconsin, the question of the validity of the assignment at common law and apart from the statute received attention. In the view taken by the State Court of the case, a determination of this issue was unnecessary. Thus we have a situation where the decision of the state court rests upon a federal ground although it might well have rested upon a non-federal ground. We take it the rule is well settled that where the decision of a state court turns both upon a federal and non-federal ground, the decision will be affirmed and this court will not examine into the correctness of the state court's decision upon the federal ground. *Petrie* v. *Nampa and Meridian Irrigation District,* 248 U. S. 154. Where however as here, the State Supreme Court took no position with reference to the non-federal ground although it might well have

based its decision upon that ground, we take it this court will inquire into the correctness of the state court's holding with reference to the federal ground. *Grayson* v. *Harris*, 267 U. S. 352. If, however, the court should take a different position than the state court took upon the federal ground, the state court should still have an opportunity to pass upon the non-federal questions urged upon it and the practice is to remand the case for further proceedings not inconsistent with the opinion of the Supreme Court. *Grayson* v. *Harris, supra.*

Thus in the case at bar, if the court should conclude adversely to the contention of the respondents upon the federal question involved, the case ought to be remanded for further proceedings by the State Supreme Court. We assume that the court is not interested in any argument with respect to the non-federal ground relied upon by the respondents in the court below. For the court's information, however, there will be found in Appendix B attached to this brief a recapitulation of the argument made by respondents upon this branch of the case in the court below.

VI.

THE COURT SHOULD NOT LEND ITS AID TO THE PLAINTIFF IN THIS ACTION.

With reference to the general approach to the question presented, we cannot close without calling attention to another phase of the case of *Boese* v. *King*, 108 U. S. 379. We submit that the idea that the plaintiffs shall by this action secure a preference over other creditors of The Joseph M. Boyd Company is an idea abhorent to the law. This matter of preferences has received much attention from the Legislature and from the courts and has universally been condemned. A great deal of legislation in Wisconsin and elsewhere has come into

being as the sole result of a desire to provide for an equitable and pro rata distribution of the assets of insolvents among creditors of the same class; and to permit the plaintiff by her action here to secure a preference is a step that should appeal to the court as being improper. There is substantial authority for the proposition that on that ground alone this action should not be sanctioned, for in the case of *Boese* v. *King, supra,* cited with approval in the *Pinkus* case, this court said in its opinion:

> "It can hardly be that the court is obliged to lend its aid to those who neglecting or refusing to avail themselves of the provisions of the Act of Congress, seek to accomplish ends inconsistent with that equality among creditors which those provisions were designed to secure." (Page 386).

While in the *Pinkus* case such a procedure was permitted, the court distinguished the situation from that presented in the *Boese* case calling attention to the fact that the plaintiff in the *Pinkus* case *could not* invoke the jurisdiction of the Bankruptcy Court, because the debtor in that case had within six years prior thereto received a discharge in bankruptcy. The court specifically stated that the insolvent had there commenced proceedings under the Arkansas Insolvency Law on the day the judgment was obtained against him, and that his purpose was to delay the plaintiff and secure a full discharge as provided by the state statute. No such situation exists in the cases at bar. While the plaintiff has pleaded that she would have invoked the jurisdiction of the Bankruptcy Court, had she been able to secure the cooperation of a sufficient number of qualified creditors, the situation presented in the Pinkus case is not involved, for here it cannot be said that the purpose of The Joseph M. Boyd Company in making this assignment was to delay the plaintiff and secure a discharge. The assignment was made more than four months before these actions were commenced, and the dis-

charge feature of Chapter 128 had been held inoperative before the circuit court was asked to take jurisdiction of the voluntary assignment. We think the case comes squarely within the rule of the *Boese* case, and that this court should not lend its aid to the plaintiff to accomplish an end inconsistent with equality among creditors.

CONCLUSION

In conclusion, therefore, it is our position that this action is forbidden by Section 128.06 Wisconsin Statutes; that this court in examining into the validity of Chapter 128 of the Wisconsin Statutes must take the statute as the State Supreme Court has construed it; that the state court has declared in favor of the severability of those portions of Chapter 128 dealing with voluntary assignments for the benefit of creditors, and including the provisions of Section 128.06; that so construed the statute is valid and proper, and under the well settled principles of this court does not contain the essential characteristics of a bankruptcy act, and does not constitute an invasion of the field of bankruptcy; that if the saving clause in Section 128.06 constitutes an invasion of the field of bankruptcy, the foundations upon which such a holding must be based would inevitably compel a repudiation of the entire chapter including that portion of the section voiding common law assignments; that in such case the assignment here is valid as a common law assignment; that inasmuch as the state court deemed it unnecessary to pass upon this issue although the issue exists in the case and may be a non-federal ground upon which the decision of the court might well be sustained, the state court ought still to be permitted to pass upon that issue; and finally that in any event plaintiff has a remedy of which she might have availed herself and when it appears that she has not done so the court

will not lend its aid in bringing about a result at variance with the equitable distribution contemplated by the state and federal enactments upon the subject.

We therefore respectfully submit that the judgment and order of the Supreme Court of the State of Wisconsin be affirmed.

Respectfully submitted,

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APPENDIX A

Those portions of the statute relating to voluntary assignments for the benefit of creditors are printed in bold face type.

CHAPTER 128.

VOLUNTARY ASSIGNMENTS

128.01 Supervision of.—The circuit court or the judge thereof in vacation shall have supervision of the proceedings in all voluntary assignments made under the provisions of this chapter and may make all necessary orders for the execution of the same.

128.02 Executions, judgment notes, preferences void.—Every levy of an execution made under a judgment confessed against an insolvent debtor within sixty days prior to his making an assignment for the benefit of creditors or under a judgment entered on a judgment note made by any such debtor within sixty days prior to his making such an assignment and the lien of any such judgment upon real estate shall be void and of no effect. Every sale, mortgage, hypothecation, lien or other security, of whatever name or nature, made, given or executed of or upon the real or personal property of any such debtor within sixty days prior to the making of such an assignment and in contemplation of the making thereof or of his insolvency shall be void and of no effect if the vendee in such sale or the person benefited thereby or by the execution of the mortgage, hypothecation, lien or other security knew or had reasonable cause to believe that such debtor was insolvent. All such assignments which shall contain or give any preference to one creditor over another, except for the wages of laborers, servants and employes earned within six months prior to the making thereof, shall be void as to the preference, but valid for all other purposes. Such void preferences shall be in-

valid as well in respect to creditors proving under the assignment as all others objecting thereto.

128.03 Powers of assignee; traverse; preference; rights of creditors; inspection of books; evidence.—The assignee shall possess all the power necessary to institute any action or proceeding to set aside and avoid any levy, sale, mortgage, hypothecation, lien or other security made, given or executed contrary to the provisions of the preceding section; and if any writ of attachment shall be levied upon the property of the assignor within sixty days prior to the execution of such assignment the assignee may appear in the action in which it issued and in the name of the assignor traverse the affidavit of attachment or any part thereof, and the verification of the answer traversing such affidavit shall be sufficient if made upon information and belief. A judgment obtained, an attachment levied or a garnishment made in collusion with a debtor shall be deemed a security given by him within the meaning of this section. All costs and expenses incurred by the assignee in any such action or proceeding shall be paid out of the estate of the assignor after the allowance thereof by the court, which may exercise its discretion in allowing the same. If the assignee shall neglect for sixty days after the execution of the assignment to institute an action or proceeding as herein provided any creditor of the assignor who has duly proved his claim, whether entitled to participate or not, may institute and prosecute to judgment any such action or proceeding in the name of the assignee and for his benefit, upon executing to the latter a bond in the sum of one thousand dollars, with two or more sureties, freeholders of this state, conditioned to hold said assignee harmless from any loss, cost or expenses which will result by the determination of the action or proceeding adversely to him. If there shall be a recovery the creditor who prosecutes the action or proceeding shall be allowed out of the estate all reasonable costs and charges paid or incurred therein, which shall be fixed by the court. The assignee or any such

creditor may, upon application to the proper circuit judge, the county judge or a court commissioner of the county where the assignment is filed, have an order for the inspection of the books of the assignor and his examination and that of other witnesses upon oath before the officer issuing such order as to the business affairs and condition of the assignor before and after the making of the assignment as to all matters pertaining to the assigned property and the assignor's indebtedness. The parties named in such order, after service of a copy thereof, shall attend at the time and place mentioned therein and submit to such examination, and their attendance may be compelled in the manner provided by law. If such examination is held at the instance of the assignee the expense thereof shall be chargeable to the estate; otherwise at the expense of the creditor or the estate as the officer before whom it is held shall determine and certify that it was instituted for the benefit of the creditors of the assignor or for other reasons.

128.04 Rights of assignee to maintain action to avoid fraudulent conveyances.—In all cases of voluntary assignment for the benefit of creditors made under the provisions of the laws of this state the assignee or assignees shall be considered as representing the rights and interests of the creditors of the debtor or debtors making the assignment, as against all transfers and conveyances of property and all liens or charges thereon which would be held to be fraudulent or void as to creditors and shall have all the rights which such creditors would have to bring and maintain an action to avoid said fraudulent conveyances and transfers.

128.05 When an assignee neglects to bring action, rights of creditor; bond, etc.—Whenever any insolvent debtor has made any conveyance or transfer of his property, with the intent to hinder, delay or defraud his creditors, or has made or suffered any conveyance, transfer or charge upon his property, which is void, by reason of being preferential or otherwise, and shall

thereafter make a general assignment for the benefit of his creditors; it shall be lawful for such assignee or his successors to commence and prosecute to judgment any proper suit or suits to vacate such fraudulent conveyance, transfer or charge. If the assignee named in such assignment or his successor, shall neglect for thirty days after the making thereof, to institute proper suit or suits to vacate such fraudulent or preferential conveyance, transfer or charge, it shall be lawful for any creditor of the assignor to institute and prosecute to judgment any such suit in the name of the assignee and for his benefit, upon giving to the assignee a bond in the sum of not less than five hundred dollars with sufficient surety resident of this state to hold the said assignee harmless from all costs or expenses to arise or accrue to him in case said suit shall be decided adversely to him; said bond to be approved by the judge of the court in which such action is to be brought. In case of recovery in such action the creditor so prosecuting the same shall be allowed out of the estate all reasonable costs and charges which he has paid or become liable to pay in prosecution of such suit or suits; such costs and expenses to be determined by the court.

128.06 Assignment, how executed; bond, mistakes; amendments; ratable distribution.—All voluntary assignments or transfers whatever of any real estate, chattels real, goods or chattels, rights, credits, moneys or effects for the benefit of or in trust for creditors shall be void as against the creditors of the person making the same unless the assignee shall be a resident of this state and shall, before taking possession of the property assigned and before taking upon himself any trust conferred upon him by the instrument of assignment, deliver to the county judge or court commissioner of the county in which such assignor or some one of the assignors at the time of the execution of such assignment shall reside, not being a creditor of such assignor, a bond duly executed to the clerk of the circuit court of the county by his name of office as obligee

in a sum not less than the present value of the assets of such assignor, which value shall be ascertained by the oath of one or more witnesses and of the assignors, with two or more sufficient sureties, freeholders of this state, who shall each testify to his responsibility and by their several affidavits satisfy the officer taking such bond that the property of such sureties, being within this state, is worth in the aggregate the sum specified therein; and the bond shall be conditioned that such assignee shall faithfully discharge the several trusts reposed in him by such assignment and diligently and faithfully collect and reduce to money the property assigned to him and account for and pay over to the several parties, then being creditors of the assignor, all moneys that shall come into his hands from the effects of such assignor after deducting the necessary expenses of performing the several trusts mentioned in the assignment, as settled and allowed by the circuit court, and abide the order of said court. But no assignment shall be void because of any defect, informality or mistake therein or in the bond, inventory or list of creditors accompanying the same; and the court or judge may direct the amendment of the assignment or of any other such paper to effect the intention of the assignor or assignee, and any such amendment shall relate back to the time of the execution of the paper to which it is made. No mistake in filing a copy instead of an original or any like mistake or inadvertent failure to comply with the provisions of this chapter shall avoid the assignment. No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of the insolvency of any debtor, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void; but in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all his creditors under the direction of the court by the assignee or by any receiver of said property and estate appointed as hereinafter provided.

128.07 Attachment; assignment.—Whenever the property of an insolvent debtor is attached or levied upon by virtue of any process in favor of a creditor or a garnishment is made against such a debtor he may, within ten days thereafter, make an assignment of all his property and estate, not exempt, for the equal benefit of all his creditors, whereupon all such attachments, levies, garnishments or other processes shall be dissolved and the property attached or levied upon shall be turned over to such assignee or receiver.

128.08 **Preferences; receivership.**—When any debtor, being insolvent, shall confess judgment or do any act or make any conveyance whereby one or more of his creditors shall obtain a preference over any other of his creditors or shall omit to do any act which he might lawfully do to prevent any of his creditors from obtaining preference over his other creditors, contrary to the intent of this chapter, or if he shall not, within ten days after any levy by attachment, execution or garnishment made against him, make an assignment of all his property, as provided in the next foregoing section, or within such time in good faith institute proceedings to vacate the attachment, execution or garnishment, or secure a release of such levy or defend against the said levy, then, or within thirty days thereafter, any two or more of his creditors holding and owning debts or claims of not less than two hundred dollars in the aggregate may make a petition to the circuit court or a judge thereof in the county or circuit where such debtor resides, if a resident of this state, and if not, in any county thereof, setting forth therein such matters and facts as may be pertinent, and after notice given in such manner as the court or judge may direct to the debtor and creditors sought to be preferred or to their attorney of record, of the time and place of hearing, the court in term time or a judge in vacation shall proceed summarily upon such petition to hear the parties and receive such evidence as may be proper, and if it shall appear to the court or judge that the debtor is insolvent and has given

a preference to any of his creditors over other of his creditors or any of them, or has refused or neglected to make an assignment of his property as hereinbefore provided, the court or judge shall appoint a receiver who shall take possession of all the debtor's property, evidences of property or indebtedness, books, papers, debts, choses in action and estate of every kind, including property attached or levied upon or garnished in the manner and subject to the limitations herein provided and of all property conveyed in violation of the provisions of this chapter, and have charge and control of the same, and of all debts or property garnished, except property exempt by law, and convert the same into money and distribute the same pro rata among the creditors having valid claims due or to become due who shall prove their claims within such time and manner as the court or judge shall direct; and the court or judge shall order the debtor to file a correct inventory of his assets and a list of his creditors as provided in section 128.13; such receiver shall be appointed and all proceedings shall be had under these statutes relating to receivers, and the court or judge may order or direct such debtor to do or refrain from doing whatsoever is necessary and proper to carry this chapter into effect. The provisions of this chapter shall not apply to any payment or satisfaction, in whole or in part, of a past-due debt made in the usual course of business without any intent on the part of the creditor to evade the same. The same proceedings may be taken and with like effect under the provisions of this section by such insolvent debtor for a discharge from his indebtedness as if said debtor had made a voluntary assignment under this chapter.

128.09 Definition of insolvency; time.—An insolvent person, within the meaning of this chapter, is one whose nonexempt property is insufficient in amount, at a fair valuation, to pay his debts; and when insolvency is to be inquired into, with reference to this chapter, it shall be determined as of the date of the making or attempting to make an assignment or of the

giving or attempting to give any preference prohibited hereby, the issuing of an execution or attachment or the institution of garnishment proceedings against the debtor's property.

128.10 **Provisional remedies.**—In all actions authorized by this chapter appropriate provisional remedies may be had and final relief administered to the equal distribution of all assets recovered among the creditors of the debtor, and the court may make such orders for the payment of costs and expenses as may be just. An action or proceeding authorized herein for the benefit of all creditors may be taken by a creditor although his demand is not due at the commencement thereof.

128.11 **Filing bond; new bond.**—Such bond shall, immediately after its execution, together with a full and true copy of such assignment, be filed by the officer taking the same in the office of the clerk of the circuit court to whom it is executed; and the taking and filing of said bond by said court commissioner or county judge shall be deemed a sufficient approval thereof, and all bonds so taken and filed are hereby declared to be sufficiently approved. Such bond and copy of assignment shall be kept by such clerk in his office, subject at all times to the inspection of all parties interested; and any creditor of the assignor may maintain an action thereon in the name of the obligee at any time for condition broken, and any judgment rendered thereon shall be held and collected for the benefit of the respective creditors of the assignor according to law and the terms and conditions of such assignment. The court may, from time to time, require the assignee to furnish a new or additional bond.

128.12 **Assignee's consent, how shown.**—The assignees named in such assignment shall each, in the presence of the officer taking such bond, before delivering the copy of such assignment to said officer for the purpose specified in the preceding section, indorse in writing on such copy their consent to take upon themselves the faithful discharge of the several

trusts specified in the assignment, and that the said copy so indorsed by them is a true and correct copy of the original; and such officer shall indorse thereon his certificate that the same is a true copy of the original and of the whole thereof, and that the said assignees named in such original assignment did in his presence make the indorsement thereon as required by this section. Said true copy so indorsed, or a duly certified copy thereof may be recorded in the office of the register of deeds of any county wherein lands are conveyed by such assignment in the same manner and with the same effect as other conveyances; and any such record heretofore made is hereby declared to be and to have been legal and valid, and shall be receivable in evidence with the same force and effect as the record of other conveyances.

128.13 Inventory of assets.—Within twenty days after the execution of the assignment the assignor shall also make and file in the office of said clerk a correct inventory of his assets and a list of his creditors, stating the place of residence of each such creditor and the amount due to each, which inventory and list shall each be verified by his oath and have affixed a certificate of the assignee that the same is correct according to his best knowledge and belief; but no mistake therein shall invalidate such assignment or affect the right of any creditor.

128.14 Notice to creditors.—Within twenty-two days after the execution of the assignment the assignee shall give notice of the making thereof and of his post-office address and that every creditor of such assignor is required to file, within three months, with such assignee or the clerk of the circuit court, naming him and his post-office address, on pain of being debarred a dividend, an affidavit setting forth his name, residence and post-office address, the nature, consideration and amount of his debt claimed by him, over and above all offsets. Such notice shall be given by publishing the same once in each week for three successive weeks in a newspaper in the county,

or, if none, in an adjoining county, and by mailing a copy of such notice to each creditor at his residence of whom the assignee shall have information.

128.15 Proof of notice; objections to claims; appeal; bill of exceptions.—At the expiration of three months from the first publication of such notice the assignee shall file with such clerk proof of the publication and a list of the creditors to whom such notice was mailed, with the dates thereof respectively, verified by his affidavit; and also a list of the creditors from whom affidavits of claims have been received by himself or such clerk, stating their names, residences and amounts claimed respectively, together with all affidavits of claims by him received. At any time within thirty days after such list is filed the assignee or any creditor may file written objections, specifying the grounds thereof, to the whole or any part of any debt claimed by any creditor, and serve a copy thereof upon such creditor as a summons of the circuit court is served, if a resident of this state, and in other cases in such manner as shall be fixed by order of the court or a judge thereof. Depositions may thereafter be taken as in civil actions. The circuit judge on application of either party shall fix by order a time when such objections shall be heard by the court or such judge, which shall be served as therein prescribed on the other party, and may from time to time adjourn the hearing, and may in his discretion award a trial by jury. Upon the final hearing the court or judge shall make such order as shall be just, and may compel the payment of costs in the discretion of the judge. An appeal may be taken from such order within thirty days from the entry thereof, but not afterwards, in the manner provided for taking appeals from orders in civil actions, and a bill of exceptions may be settled thereon as in other cases.

128.16 Creditors, when barred; what debts provable, how paid; taxes; labor.—Every creditor of the assignor who shall not file such an affidavit of his claim within the time limited

as aforesaid shall not participate in any dividends made before his claim is filed. Debts to become due as well as debts due may be proved, a rebate of interest being made to the time of dividend on such as do not bear interest and interest being computed, when demandable, upon others to the time of dividend. The assignee may pay, or the court may order a dividend to be paid, at any time, making such provision as shall be necessary for the protection of claims in dispute. But before making any dividend the assignee shall pay all taxes assessed upon the property assigned, which remain unpaid, and the compensation due all laborers, servants and employes for labor or personal services performed for the assignor within the six months next preceding the making of the assignment, the claims for which shall be paid by him next after the payment of unpaid taxes and assessments, debts due the United States or this state, the expenses of the assignment and the execution of the trust.

128.17 Settlement of assignee's accounts.—Every assignee who shall accept the assignment of any property under the provisions of this chapter or who has heretofore accepted his trust and has not settled the same shall, within six months thereafter or within such further time, not exceeding one year, as the court or judge shall allow, file with the clerk a full and itemized statement, verified by his oath, of the property by him received, the manner of his dealing therewith, the amount of money realized by him, the condition of the property and funds in his possession, the names and residences of the assignor's creditors, the dividends paid them, his receipts and disbursements, with his claim for compensation; provided, that if the court or judge shall decide that special reasons for further delay exist the time for such settlement may be further extended as the court or judge may order. If any such assignee shall neglect so to do or to promptly apply for a settlement of his account the court or judge may, upon application of any such creditor, compel the making and filing of such ac-

count or settlement thereof by order, and in such case the assignee may be denied, in the discretion of the court or judge, any compensation. Upon filing such report such assignee may apply to the court, upon not less than twenty days' notice thereof by mail to the respective creditors named therein, for a final settlement of such account; and at the time and place named the circuit court shall hear any objections made by any creditor, take such evidence as may be proper, and settle and adjust such accounts and the compensation and expenses of such assignee, whether objection be made or not, as shall be just; and his order thereupon shall be conclusive upon all parties, including the sureties of the assignee; but the assignee or any creditor may cause a bill of exceptions to be settled and appeal from such order within six months from the entry thereof to the supreme court in the manner prescribed for appeals in civil actions, except that the assignee may file his notice and undertaking with the clerk without other service thereof. At any time after the expiration of three months from the publication of the notice mentioned in section 128.15 the assignee may file with the court a receipt in full or release executed by all the creditors of the assignor who have filed an affidavit or proof of their claims as required by section 128.14, up to the time of such application, together with the written consent of the assignor, and apply to the court for his discharge as assignee, which application shall be granted; and the court shall make an order requiring the assignee to deliver all property held by him as such assignee to the assignor, provided the assignor shall pay his fees and expenses and the costs of court, and thereupon the assignee shall be released and discharged from all liability to the creditors of the assignor for any moneys or property coming to his hands as such.

128.18 Removal of assignee.—The circuit judge may, upon notice and after a hearing, remove any assignee who is shown to be incompetent, or to have become disqualified, or to have wasted or misapplied any of the trust estate, and shall also re-

move any such assignee upon the application of a majority of the creditors of such assignor who shall also represent a majority in value of the debts against said estate, and compel by order a settlement of his account and surrender of the estate to his successor, and shall appoint the person named in such petition or some suitable person as his successor, who shall qualify in the same manner provided by law for the assignee appointed by the instrument of assignment; and in place of any assignee who shall die or be removed may appoint another, who shall give like bond and be subject to like duties and responsibilities as to the estate remaining undisposed of and proceedings remaining to be taken as if appointed by the instrument of assignment.

128.19 Whom discharged.—Any person who shall have made a voluntary assignment for the benefit of his creditors under or in pursuance of this chapter may be discharged from his debts as a part of the proceedings under such assignment upon compliance with the following provisions.

128.20 Application, how made.—Such insolvent debtor who shall desire to be discharged from his debts shall, within one year after filing a copy of his assignment in the office of the clerk of the circuit court and before the final settlement of the accounts of the assignee under his assignment, file in the office of the clerk of the circuit court where such assignment is filed and present to such circuit court or to the presiding judge thereof his application for such discharge, addressed to said court or judge, in which application he shall state the date of filing of such assignment, the clerk's office where the same is filed, the name and post-office address of the clerk with whom the same is filed and the name and post-office address of the assignee named in such assignment.

128.21 Verification.—Said insolvent debtor shall sign said application and annex thereto an affidavit subscribed and sworn to by him, substantially in the following form:

STATE OF WISCONSIN, } ss.
County of_____ }

I, _____, do solemnly swear (or affirm) that I have read (or heard read) the foregoing application signed by me; that the same is true of my own knowledge; that the inventory of my estate and the list of my creditors, filed in the office of the clerk of the circuit court for the county of_____as a part of my assignment, are as accurate and complete statements of all my property, except such as is exempt from sale on execution, and of my creditors as I can make; that I have not at any time or in any manner whatsoever disposed of or made over any part of my estate for the benefit of myself or of my family or in order to defraud any of my creditors; that I have in no instance created or acknowledge a debt for a greater sum than I honestly or truly owed, and that I have not paid, secured to be paid, nor in any way compounded with any of my creditors with a view to fraudulently obtain the discharge prayed for in the foregoing application.

128.22 Showing cause against discharge; hearing; service. —Upon filing and presenting such application as hereinbefore required the court or judge to whom it is presented shall make an order, entitled in the matter of such assignment, requiring all the creditors of such debtor to show cause, if any they have, why such debtor should not be discharged from his debts. Such order shall refer to said assignment and state the time and place of the filing thereof, the name and post-office address of the clerk in whose office the same is filed, the name and address of the assignee named in such assignment and the time and place of the filing of such application. If such application is made to such court such order shall also fix a day in the same or the next ensuing term for a hearing thereof at the court-house or at the chambers of such judge, designating the place thereof, and shall also require a copy of such order be published in a newspaper published in the county in which the

application was made, if there be one, and if not, then in a newspaper published in an adjoining county, for at least six successive weeks prior to the day of hearing; and also direct that a copy of such application and of said order be, within five days from the date of such order, deposited in the post-office, postpaid, directed to each of the creditors of such insolvent debtor whose address is known to him; but if a copartnership be a creditor it shall not be necessary to mail a copy of such application and of such order to each member thereof, but it shall be sufficient if a copy of each be so deposited and directed to such copartnership in its firm name or designation.

128.23 Proof; jury trial.—On the day fixed in such order or at any subsequent day or time that such judge or court may appoint such judge or court shall hear the proofs and allegations of the parties, and before any other proceeding be had shall require proof of the publication of said order and of the mailing of a copy of said application and order as in said order required. On such hearing the application shall be regarded as a complaint, and any creditor of said debtor who may desire to object to his discharge may file in the office of the clerk of said court and present on such hearing his answer to such application, verified as pleadings are required to be verified, setting forth the grounds of his objection to such discharge. Every creditor opposing such discharge may, at the time appointed for the first hearing, demand of the court or judge that the cause be heard and tried by a jury and shall be entitled to an order to that effect, and in all cases ordered to be so tried such trial shall be had in the county where such debtor shall reside, subject to a change of the place of trial for like causes and according to the provisions which govern in actions pending in the circuit court. If such demand is made to such court the jury shall be drawn in the same manner as in civil cases from the jurors summoned and attending such court, who shall be sworn as prescribed in the next section.

128.24 Venire; verdict; disagreement; adverse examination.—If such demand is made to such judge he shall name eighteen freeholders of the county, qualified by law to serve as jurors, and issue a summons to the sheriff or some constable commanding him to summon the persons so named to appear before him at such courthouse or at his chambers, designating them, at a day fixed in such summons, not less than six nor more than twelve days from the time of issuing the same, at which time and place twelve of such persons shall be drawn to serve as a jury in the same manner as juries in circuit court are drawn, and who shall be sworn well and truly to hear, try and determine the validity of the objections so specified. There shall be but one hearing before a jury unless a retrial is granted, and if they cannot agree they shall be discharged, and such court or judge shall decide the merits of such application and objections thereto in the same manner as if no jury had been called. At the hearing on any such application, before a jury or otherwise, the debtor may be examined on oath at the instance of any creditor touching his estate or debts or as to any matter stated in his application, and any such creditor may contradict or impeach by other competent evidence any testimony given by such insolvent debtor.

128.25 Discharge.—Every creditor of such debtor, whether residing within or without this state, who shall file an affidavit or make other proof of his claim against such debtor or receive any dividend from his assignee or out of his estate or shall in any way participate in the proceedings under such assignment shall be deemed to be a party to the proceedings for a discharge of such insolvent debtor from his debts, and the filing of such affidavit, the making such proof of claim, receiving such dividend or participation in such proceedings shall be deemed and is declared to be an appearance in the matter of such assignment and application for a discharge, and the order and discharge made and granted shall be final and binding upon all of such creditors, subject to their right to appeal, from

any order, decision or judgment made or entered in such proceeding, in the manner provided by law. If it shall appear upon such hearing or trial that such debtor has in good faith made a voluntary assignment for the benefit of his creditors and has in all respects complied with the law in relation to such assignments, and with the provisions of the five preceding sections such court or judge shall grant such debtor a discharge from his debts, which shall have the effect herein declared.

128.26 **Judgment; effect of discharge.**—Upon the granting of such discharge the clerk of said court shall immediately enter judgment in the judgment docket thereof against said debtor and in favor of each of his creditors who appears, by the list filed with his assignment, to be a resident of this state and in favor of each of the creditors of said debtor whose residence appears by such list to be out of the state and who has proved his claim against said debtor under such assignment or appeared in the proceedings under such assignment, or received any dividend from the assignee of such debtor, or out of his estate, or in any way participated in the proceedings under such assignment, or who has appeared in the proceedings for such discharge for the sum respectively appearing or shown to be due and allowed to him in the proceedings under such assignment, and shall also enter a discharge thereof upon such docket by order of said court, which shall discharge such debtor from all personal liability in favor of such creditors as are in this section indicated. Said clerk shall be entitled to receive a fee of five dollars for docketing and discharging such judgment. In any action brought against such debtor by any creditor who has done either of the things mentioned in this section a discharge granted pursuant to the preceding provisions may be pleaded and shall be a bar to the recovery against him for or on account of any indebtedness or liability of his found due in such proceedings and included in said judgment so entered and discharged.

128.27 Appeals.—Appeals may be taken to the supreme court by such insolvent debtor or by any creditor from any order or judgment made or entered in such proceeding, within the time and in the manner as appeals in ordinary civil actions, and whenever necessary bills of exceptions may be settled as on such appeals.

128.28 Discharge of partners; application.—In all cases where a partnership shall have made a voluntary assignment for the benefit of its creditors any member of such partnership who has no property or effects not exempt from execution may be discharged from all his liabilities as such member in the proceedings on the assignment of such partnership upon filing his application for a discharge as herein provided. Such person shall state in his application the existence of such partnership, the name and post-office address of each partner, the making of the assignment, the name and post-office address of the assignee named in such assignment, the date of the filing of such assignment, the name and post-office address of the clerk in whose office the same is filed and that he has no property or effects of any kind not exempt from execution. Such applicant shall annex to such application his affidavit, subscribed and sworn by him, in substantially the following form:

STATE OF WISCONSIN, }
County of---------- } ss.

I, ----------, do solemnly swear (or affirm) that I have read (or heard read) the aforegoing application signed by me; that the same is true of my own knowledge; that the inventory of the estate of the partnership therein mentioned and the list of the creditors of such partnership, filed in the office of the clerk of the circuit court for the county of------ as a part of the assignment of said partnership, are as accurate and complete statements of the property and creditors of said partnership as I can make; that I have no property or estate of any kind not exempt from execution; that I have not at any time

or in any manner whatsoever disposed of or made over any part of my estate for the benefit of myself or my family in order to defraud any of my creditors, and that I have in no instance created or acknowledged a debt for a greater sum than I honestly or truly owed, and that I have not paid, secured to be paid or in any way compounded with any of my creditors or the creditors of said partnership with a view to fraudulently obtain the discharge prayed for in the foregoing petition.

128.20 Effect of discharge.—The discharge granted to any member of any partnership may be pleaded in any action brought against him on any indebtedness against said partnership in the same manner and with the same force and effect as hereinbefore provided, and the same shall constitute a bar to a recovery against him for or on account of any indebtedness or liability of his as a member of such partnership.

APPENDIX B

The Assignment Is Valid As A Common Law Assignment.

If the appellees are correct in their position that Chapter 128 of the Statutes is superseded by the Bankruptcy Act, then it is the position of the appellants that nevertheless the assignment is valid as a common law assignment. We have already adverted to the fact that the right to assign property for the benefit of creditors is a right inherent in the ownership of property, and a right which corporations may exercise as well as any private individual. Whether or not the assignment was intended originally as a common law assignment does not seem to us to make any difference if Chapter 128 has been superseded by the Bankruptcy Act. The fact remains, however, that while the order of the court assumes to take jurisdiction under Chapter 128, it is clear from the answer filed by the garnishee containing the original assign-

ment, the petition to the court, the order of the court assuming jurisdiction, and the amended assignment, that an exact compliance with the provisions of that chapter was not contemplated either by the parties to the assignment or by the court for we find the court setting a different bond than that required by the statute, and providing for a different period of time within which the inventory was required to be filed than that called for by the statute, and we find the very terms of the assignment and particularly the amended assignment inconsistent with an exact compliance with the statute.

Some argument was addressed to the trial court by the appellees directed to the proposition that the Federal Bankruptcy Act constitutes such an invasion of the field as to suspend and supersede voluntary assignments for the benefit of creditors at common law as well as statutory enactments of the character of Chapter 128. It seems to us that this is so obviously erroneous as to require only a very brief answer. The mere fact that the Bankruptcy Act makes the execution of a voluntary assignment an act of bankruptcy voidable within four months by the filing of a petition certainly shows an intention to regard assignments for the benefit of creditors at common law as valid and proper, and not inconsistent with the Bankruptcy Act or an invasion of the field of bankruptcy. If this were not enough, we find that the courts have repeatedly sustained assignments for the benefit of creditors as proper. *Mayer* v. *Hellman, supra.*

Considered as a common law assignment, it is urged by the appellees that the assignment is invalid because (a) it limits the liability of the trustees (b) it authorizes a sale of assets on credit, and (c) it authorizes the continuance of the business and the incurring of expenses and the mortgaging of property. In the trial court counsel cited the cases of *Hutchinson* v. *Lord,* 1 Wis. 286; *Keep* v. *Sanderson,* 2 Wis. 42; *Norton* v. *Kearney,* 10 Wis. 433, and *Vernon* v. *Upson,* 60 Wis. 418. We frankly concede that these cases do tend to

substantiate the point made by the appellees. The trial court in passing upon this feature of the case cited the case of *Vernon* v. *Upson, supra*, and relied upon it. It is our opinion, however, that none of these cases should be followed at the present time.

The decision of the court in these cases was based solely on the proposition that a provision in the instrument of assignment limiting the liability of the trustees, authorizing the sale of assets on credit, and authorizing the continuance of the business, had a tendency to hinder and delay creditors and was, as the court put it in one of the cases, "a badge of fraud," and therefore in violation of the Statute of Frauds. Now the Statute of Frauds provided in substance then as it does now that "every conveyance * * * made with the intent to hinder, delay or defraud creditors * * * is fraudulent." *Sec. 242.07.* It was on the theory that an assignment for the benefit of creditors containing such a provision evidenced an intent to hinder or delay creditors that these assignments were held invalid. All of these cases with the exception of the case of *Vernon* v. *Upson* were decided prior to the enactment of Chapter 80, and the case of *Vernon* v. *Upson* was decided prior to those amendments inserted in Chapter 80 which evidenced the intention of the Legislature to provide a scheme for the administration of property voluntarily assigned which might involve the carrying on of a business. It is our position that with the enactment of this statute which clearly contemplates the possible sale of assets on credit and the continuance of a business, is no longer possible to say that an instrument of assignment which permits these things to be done *evidences an intent to hinder and delay creditors* and is *"a badge of fraud."* This is especially true when we consider the language of this court with reference to just such an instrument in the case of *Mayfield Woolen Mills Co.* v. *Goodrich & Martineau,* 189 Wis. 406. There the court stated:

> "It is drafted ingeniously and presents a comprehensive scheme for the administration of the trust property. It appears to us that it creates a practical and workable trust, and we assume that its use is often resorted to by adjustment Bureaus acting in the interests of creditors. The principal advantage to be derived from such an instrument is the proper retention of the business as a going concern, and the maintenance as an asset of its good will; and in addition thereto it affords an opportunity for payment of claims of creditors in full." (Page 412.)

Counsel may disagree with us, but we do feel that after all is said and done, there is such a thing as the march of progress, and that with changing economic and social conditions the outworn and outmoded machinery provided by an earlier law for the solution of business problems must give way. The approach to the problem presented by the Workmen's Compensation Act as illustrated in the case of *Borgnis* v. *Falk Co.*, 147 Wis. 327, exactly epitomizes the approach that should be made to the problem here. Not only do our conceptions of constitutional mandates as in the *Borgnis* case change with changing times, but so does our conception of the meaning of human actions and the inferences to be drawn therefrom. As Justice Winslow so well said in that case:

> "Where there is no express comment or prohibition, but only general language or policy to be considered, the conditions prevailing at the time of its adoption must have their due weight; but the changed social, economic and governmental conditions and ideals of the time, as well as the problems which the changes have produced, must also logically enter into the consideration and become influential features in the settlement of problems of construction and interpretation." (Page 349.)

The small merchants and manufacturers of the Nineteenth Century have been supplanted in this machine age with an infinitely more complicated business and financial system, with huge corporate structures and tremendously involved and inter-related systems of credit, requiring a new type of machinery to meet the problem of the failing business man. We submit that in this day and age the type of assignment involved in the *Mayfield Woolen Mills* case and involved in these cases is at least as well, if not better, fitted to protect the interests of creditors than the type of assignment which the court thought proper in the case of *Lord* v. *Hutchinson, supra,* and we submit that it can no longer be said that the good faith limitation of the liability of the assignee, an authorization to sell assets on credit, and an authorization to continue the gradual liquidation and winding up of business, is a badge of fraud.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1932

No. 171

MRS. J. H. POBRESLO,

Plaintiff and Appellant,

vs.

JOSEPH M. BOYD COMPANY,

Defendant,

CLARENCE E. KARN, L. D. ATKINSON, LEO T. CROWLEY and EDWARD J. SAMP,

Garnishee Defendants and Respondents.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF OF STATE OF WISCONSIN AS AMICUS CURIAE

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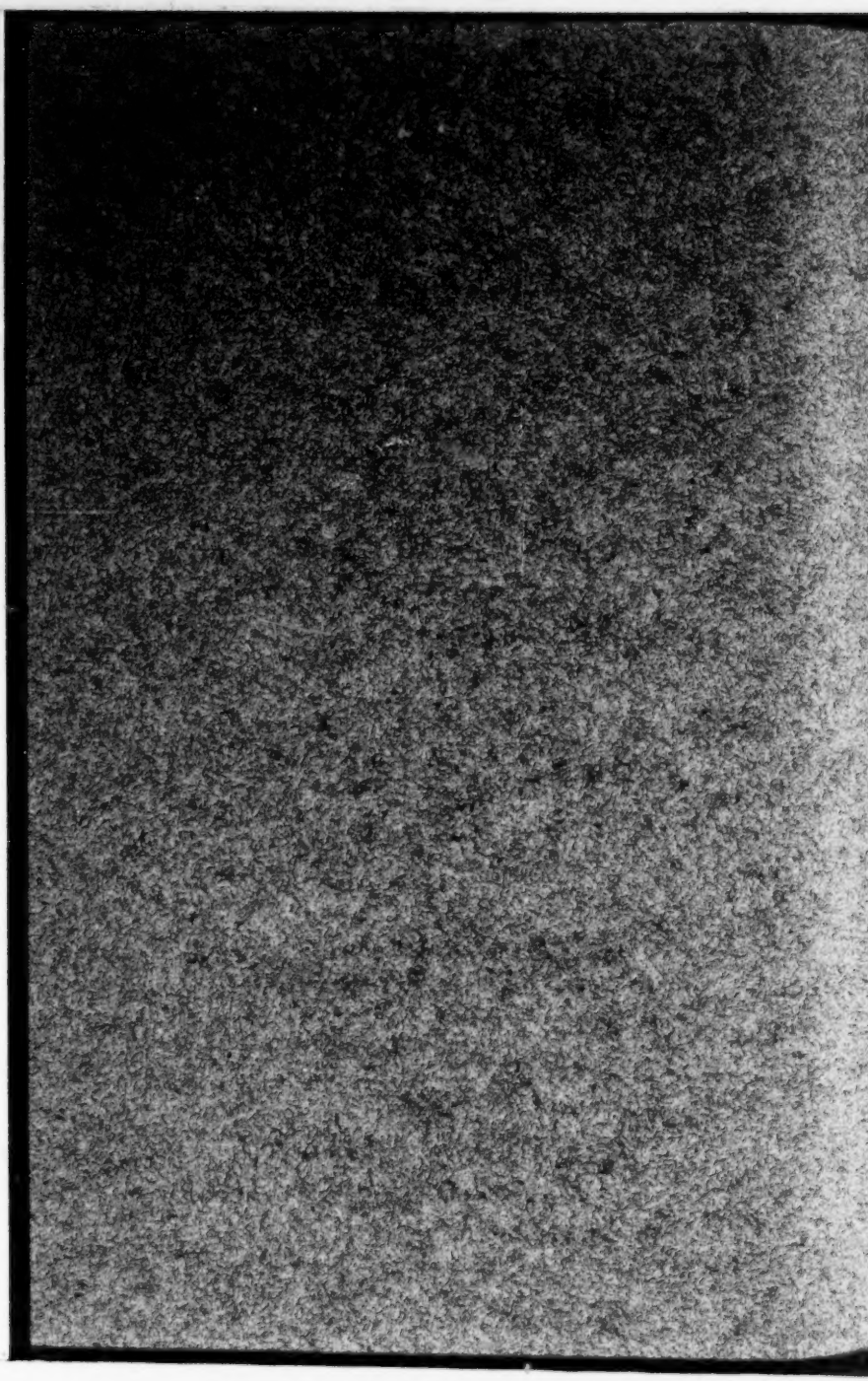

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BRIEF OF STATE OF WISCONSIN AS AMICUS CURIAE

INTRODUCTORY STATEMENT

The judgment of Wisconsin Supreme Court appealed from held that plaintiff herein was not entitled to secure a priority by garnishment on assets in the hands of assignees under a voluntary assignment for benefit of creditors executed on March 23, 1931 by the Joseph M. Boyd Company, a Wisconsin corporation. In so holding, the Wisconsin Supreme Court upheld as in force that part of Section 128.06 Wisconsin Statutes, 1929, which was created by

Chapter 334, Laws of 1897. That provision precludes a creditor by attachment or garnishment (as here) securing any priority or advantage over other creditors where the debtor (as here) has attempted to make a voluntary assignment but has failed to comply with the requirements which up to the time of this amendment (of 1897) had under the state law been mandatory to the validity (as to creditors) of a voluntary assignment. Up to the time of this amendment, it had been held that failure to file bond in amount equal to assets rendered the assignment void as to creditors. Up to the time of this amendment, a creditor could secure priority by garnishment in such a case. This amendment (in 1897) to Sec. 128.06 (then Sec. 1694 of the Statutes) simply denied the remedy of garnishment in such cases and modified the rule as to the requirements so as to make them directory only.

We feel that the state clearly has the right to encourage voluntary assignments, to regulate them, and to deny the remedy of garnishment where the debtor has honestly attempted to make an assignment for the benefit of his creditors. It is not even claimed that to deny garnishment in such a case is discriminatory or invalid as in violation of the 14th amendment. The policy of the State of Wisconsin is not to permit the use of its own state remedy of garnishment to secure a priority where in good faith a voluntary assignment has been made for the benefit of creditors. The state which created the remedy may, we believe, modify or withhold it. But it is claimed by appellant here that, because the statute also provides for execution and administration of the voluntary assignment according to the law of this state, the entire voluntary assignment law (including this provision against the securing of priority by garnishment or attachment) must be accepted as a unit and as a unit held suspended. This is indeed a broad and

revolutionary contention and one in which the State of Wisconsin has a vital interest.

The judgment below simply denies plaintiff a remedy which plaintiff cannot now have under the state law. The policy of the law used to be to recognize a priority gained by the so-called 'diligent creditor' regardless of what may happen either to the business of the debtor or other creditors. The present policy of the state as it has existed for many years and as exemplified by the section of the statutes here in question, is different. The state seeks to encourage voluntary assignments for the benefit of all creditors and to encourage cooperation between creditor and debtor. The State of Wisconsin is vitally interested in maintaining the validity of this law which denies the use of garnishment to gain priority in such cases; it is also vitally interested in preserving the right of a debtor in Wisconsin to make a voluntary assignment in honest cooperation with his creditors and in maintaining the right of the state legislature and the state courts to regulate and control the execution of such a trust where there has been no proceeding taken to bring the case under the jurisdiction of the bankruptcy courts. The state statutes are applicable whether the assignor be solvent or insolvent and where no discharge is contemplated or provided for.

The State of Wisconsin recognizes that the National Bankruptcy Act makes a voluntary assignment an act of bankruptcy. If the assignment is unfavorable or unfair to creditors then creditors sufficient in number and amount can readily transfer the whole matter to the Federal courts. But by the very fact that it declares an assignment for the benefit of creditors to be only an act of bankruptcy, the National Congress has recognized that there is a proper field for state administration and regulation of such assignments. In the present case the assignor has not stipulated for or applied for any discharge. No creditor by

accepting a dividend binds himself to a discharge. No action by him is barred or suspended as against the debtor but the property transferred is in a trust created by the voluntary act of the debtor. No involuntary proceeding and no discharge is needed or in any way involved. The assignment is made and the regulatory provisions here in question apply regardless of whether the assignor is solvent or insolvent. Such assignments and distribution among creditors in accordance therewith without discharge are widely used, have never been considered in fact as invading the field of the bankruptcy law and present a broad and useful field for state administration which the State of Wisconsin considers is of vital importance to preserve.

There are a great many such proceedings pending in Wisconsin today, the validity of which is challenged by the broad claim of appellant in this case that any law providing for the equitable distribution of the assets of a debtor, who may be shown to be insolvent, is a bankruptcy law invading the field of the National Act. There are a great many such proceedings pending in which a just and fair distribution of assets would be defeated by a holding that the part of Section 128.06 here in question is suspended.

For many years debtors and creditors in Wisconsin have availed themselves of voluntary assignments. This has been true though the debtor did not know whether or not he was insolvent, also where the debtor believes himself solvent and also where he knows he is insolvent. In many of these assignments (see *Mayfield Woolen Mills v. Goodrich & Martineau Co.*, 189 Wis. 406 (1926)) the assignment provided, as here, for a continuance of the business. Such provisions are extremely valuable and beneficial as tending to preserve good will and the value of the business. Voluntary assignments have been a valuable means of avoiding the stigma of bankruptcy, many times preserving solvency. Though the assignor may be found to be insolvent,

insolvency is of course not a requisite to a voluntary assignment nor to the regulation and administration thereof under Wisconsin Statutes, Ch. 128.

The State of Wisconsin is vitally interested in preserving its own proper legislation and jurisdiction and its own control over the remedy of garnishment in that state. It is also vitally interested in preserving other remedies such as creditors' sequestration actions against corporations where the property of the corporation is applied to the payment of its debts. (Secs. 286.10 et seq. Wis. Stats. 1931) Such proceedings may be maintained by any judgment creditor whose execution has been returned unsatisfied and the court restrains other creditors from securing priority. In these proceedings notice is given to creditors and assets distributed. If the position of appellant in this case is sound, then all such proceedings must fall since in all of them an equitable distribution of assets among creditors under a state statute and in the state courts is accomplished.

The State of Wisconsin feels that the field of bankruptcy under the Federal Constitution and as involved in the present Federal Bankruptcy Law should not be extended by construction to prohibit state provisions as to voluntary assignments which do not involve any discharge and are not limited to insolvents. The Bankruptcy Act has never been so construed in practice. There has been built up a widespread and valuable use of voluntary assignments; and at least in the absence of a clear mandate from Congress the State of Wisconsin feels that there is no substantial ground or reason for holding that the Bankruptcy Law covers this field. No doubt this case would never have arisen were it not for some language in the case of *International Shoe Co. v. Pinkus,* 278 U. S. 261 which we believe has by appellant here been given a construction never intended in that case. The

State of Wisconsin regards the question here presented as of vital importance to it and its citizens and hence has asked and obtained leave to file this brief as a friend of the court.

Misconception of Position of Supreme Court of Wisconsin by appellant in this case.

We think appellant in this case has not correctly interpreted the position of the Wisconsin Supreme Court in this case. At page 18 of Appellant's Brief, it is stated that the Wisconsin court has held the entire Chapter 334, Laws of 1897 to be valid and in force and effect. At page 51 of Appellant's brief it is claimed the Wisconsin court has not treated any part of Ch. 334, Laws of 1897 as severable but held it valid and in force in toto.

This is we submit, with much respect, an absurd construction of the decision of the Wisconsin Supreme Court. It is quite obvious from its opinion that the Wisconsin Supreme Court stated in substance that the provisions of Sec. 128.06 (here involved) *were separable* from the provisions of 128.08 (relating to involuntary proceedings and discharge) although both the part of 128.06 here in question and 128.08 were introduced into the statutes by Ch. 334, Laws of 1897. Obviously the Wisconsin Supreme Court has not held here or in any other case that Sec. 128.08 created by Ch. 334, Laws of 1897 is in force *in toto*. The reference to Ch. 334, Laws of 1897 as valid in the opinion of Wisconsin State Court herein is obviously to the saving clause of Sec. 128.06 here in question created by Ch. 334 Laws of 1897 and as applied to voluntary assignments. Thus the Supreme Court in present case said: (Trans. of Record, pp 41–42)

> "Various contentions are made by the parties in the carefully prepared briefs submitted by them, but in the view we take of this case but two questions require determination.

1. May the provisions of ch. 128, which pertinently relate to voluntary assignments for the benefit of creditors, be severed from the other provisions of said chapter which concededly amount to insolvency proceedings, in that they provide for the discharge of insolvent debtors?

2. If the provisions of ch. 128 regulating voluntary assignments for the benefit of creditors may be severed from the other provisions of said chapter, then are such provisions relating to such assignments for the benefit of creditors, suspended so long as the Federal Bankruptcy Act shall be in force and effect, because in conflict therewith?"

The court then refers to In re Voluntary Assignment of Tarnowski, 191 Wis. 279, 210 N. W. 836 and to other Wisconsin decisions to which we shall hereinafter refer (on this question of severability) and comes to following conclusion: (R. 42)

> "There exists in our minds no question as to the plain duty of this court to construe the several provisions of ch. 128, relating to assignments for the benefit of creditors, *as separate and distinct* from the other provisions of said chapter relating to the discharge of insolvent debtors." (Italics ours)

Obviously the above takes the parts of the law relating to assignments introduced by Ch. 334, Laws of 1897 and treats them as separable from insolvency and discharge features of Chapter 128 including such features *as were introduced in 1897*. Obviously the court did not intend to treat differently discharge provisions introduced by the Act of 1897 from discharge features introduced by prior enactments.

As a final conclusion the court said: (R. 51–2)

> "that ch. 334 of the laws of 1897, constitutes a valid enactment and barred the plaintiff herein from bringing a garnishment action against the assignees, even

though the assignment would otherwise be void *but for such saving clause.* The judgment of the circuit court must, for the reasons stated, be reversed." (Italics ours)

Plainly the court was referring to the part of Ch. 334, of the laws of 1897 which is *"the saving clause"* added to Sec. 128.06 (there Sec. 1694). It had no intention to declare Ch. 334, Laws of 1897 valid and in force *in toto.* It is clear the court held such saving clause as a part of Sec. 128.06 relating to voluntary assignments was separable from the other provisions of Ch. 128 relating to insolvency and discharge *whatever or whenever may have been the source of such provisions.* This is made the more obvious by the court's own entire summary of its conclusions as follows. (R. 51–2)

> "We conclude, therefore, that the provisions of ch. 128, relating to voluntary assignments for the benefit of creditors are properly severable from the remaining sections of said chapter; that so severed they are not in conflict with the Federal Bankruptcy Act; that an assignment for the benefit of creditors is an act of bankruptcy and all proceedings in the state court might be superseded by the federal bankruptcy act when the jurisdiction of the federal court is properly and in a timely manner invoked; that ch. 334 of the laws of 1897, constitutes a valid enactment and barred the plaintiff herein from bringing a garnishment action against the assignees, even though the assignment would otherwise be void *but for such saving clause.* The judgment of the circuit court must, for the reasons stated, be reversed." (Italics ours)

The court in this case therefore clearly separated Section 128.06 with the saving clause here in question relating to garnishments and voluntary assignments from the features of Sec. 128.08 and succeeding sections relating to involuntary proceedings against an insolvent and discharge.

But this same separation had been made by prior Wisconsin decisions and the separation has been recognized and applied for many years in Wisconsin.

And in making the separation by decision and in practice and in leaving such practice undisturbed by further legislative action Wisconsin has relied on the repeated decisions of this court interpreting the bankruptcy act in accord with the very distinction and separation which has been recognized and applied in Wisconsin. These decisions of this court have repeatedly been applied and recognized by our supreme court and are followed in the very separation of provisions which is accepted by the decision here under review. How clearly the separation between provisions as to voluntary assignments of debtors (whether they be solvent or insolvent) and provisions relating to involuntary proceedings and to discharge in any case has been made in Wisconsin is shown by a further review of the statute and decisions. We refer only to some additional considerations and do not propose to cover the same ground as respondent's brief in which we fully concur.

The statute here in question Sec. 128.06 Wisconsin Statutes of 1929 (in force at time of assignment for benefit of creditors here in question) provides as follows:

> "All voluntary assignments or transfers whatever of any real estate, chattels real, goods or chattels, rights, credits, moneys or effects for the benefit of or in trust for creditors shall be void as against the creditors of the person making the same unless the assignee shall be a resident of this state and shall, before taking possession of the property assigned and before taking upon himself any trust conferred upon him by the instrument of assignment, deliver to the county judge or court commissioner of the county in which such assignor or some one of the assignors at the time of the execution of such assignment shall reside, not being a creditor of such assignor, a bond duly executed

to the clerk of the circuit court of the county by his name of office as obligee in a sum not less than the present value of the assets of such assignor, which value shall be ascertained by the oath of one or more witnesses and of the assignors, with two or more sufficient sureties, freeholders of this state, who shall each testify to his responsibility and by their several affidavits satisfy the officer taking such bond that the property of such sureties, being within this state, is worth in the aggregate the sum specified therein; and the bond shall be conditioned that such assignee shall faithfully discharge the several trusts reposed in him by such assignment and diligently and faithfully collect and reduce to money the property assigned to him and account for and pay over to the several parties, then being creditors of the assignor, all moneys that shall come into his hands from the effects of such assignor after deducting the necessary expenses of performing the several trusts mentioned in the assignment, as settled and allowed by the circuit court, and abide the order of said court. *But no assignment shall be void because of any defect, informality or mistake therein or in the bond, inventory or list of creditors accompanying the same; and the court or judge may direct the amendment of the assignment or of any other such paper to effect the intention of the assignor or assignee, and any such amendment shall relate back to the time of the execution of the paper to which it is made. No mistake in filing a copy instead of an original or any like mistake or inadvertent failure to comply with the provisions of this chapter shall avoid the assignment. No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of the insolvency of any debtor, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void, but in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all his creditors under the direction of the court by the as-*

signee or by any receiver of said property and estate appointed as hereinafter provided." (The part in italics was introduced by Chapter 334, Laws of 1897 which also created some other sections hereinafter referred to.)

The assignor here does not challenge the assignment as not carrying out its intent. The assignment made after this law incorporates the separable enforceable provisions but leaves out suspended provisions.

The assignment here in question was made with full knowledge of above provisions and with full knowledge that only so much of our statutes as did not conflict with the bankruptcy law remain unsuspended. Also with full knowledge *and the right to assume* that all provisions of Chapter 128 including the above provision were not and are not suspended unless in conflict with the federal act. The assignor, a resident of Wisconsin, and a Wisconsin corporation, had the right to execute an assignment without filing bond and without filing inventory as originally prescribed and made mandatory by Sec. 128.06 Wis. Statutes (before the amendment of Chapter 334, Laws of 1897) knowing that by so doing it would prevent any one creditor from securing a valid priority by garnishment and also knowing that in the administration of said assignment such provisions and only such of state law would be applicable as are not suspended by the Federal law.

In *Voluntary Assignment* of *Tarnowski*, 191 Wis. 279 (1926), it had been held that a creditor voluntarily participating in a voluntary assignment proceeding in the state court under Chapter 128 and receiving dividends *did not* thereby consent to the discharge of the debtor under any provision of Chapter 128 providing for a discharge, although the debtor asked for a discharge in that case. *It was held that the creditor by his consent and participation*

must be deemed to have consented to have applied only such provisions as were not suspended. **The court held that the provisions of Chapter 128 relating to voluntary assignments and their administration were not suspended and by these he was bound. It held that provisions as to a discharge of voluntary assignor were suspended.**

The court said:

> "In this case *Tarnowski* made a voluntary assignment for the benefit of his creditors. In order for the creditors to have the benefit of the assignment, it was necessary for them to file and prove up their claims. This by reason of the statutory provisions regulating voluntary assignments. As the voluntary assignment was for the benefit of creditors, and as each creditor was entitled to his *pro rata* share of the estate, a creditor incurs no penalties or forfeitures by complying with statutory regulations necessary to enable him to acquire his *pro rata* share, except such penalties and forfeitures as are prescribed by the regulations themselves. As the statute providing for a discharge of the debtor is no part of the regulations governing voluntary assignments for the benefit of creditors, it follows that the appellant did not waive its right to object to the discharge of the debtor by filing its claim or accepting its *pro rata* share of the proceeds of the estate."

Obviously the above squarely held that all discharge features of the law including those in the separate sections created by Ch. 334, Laws of 1897 were suspended.

It was just as arguable in that case as in the present case that the discharge features constituted a part of the consideration for the regulations as to assignments. And at the time of the assignment there involved Sec. 128.08 Wisconsin Statutes 1929 providing for involuntary proceedings in certain cases of preference was in the statutes and contained the provision for a discharge. Obviously in

that case such section was not regarded as an inseparable part of the chapter relating to voluntary assignments. If it was an inseparable part then it must have condemned the whole chapter just as much as it could now condemn Section 128.06.

Separability of part of statute here in question clearly established by Wisconsin decisions which in turn directly followed decisions of this court.

But the separability of Section 128.08 as to involuntary proceedings and its provisions for a discharge from Section 128.06 maintaining the validity of good faith assignments without compliance with all the requirements of the section is further shown by other important considerations.

By Chapter 334, Laws of 1897 the present section 128.06 (and which up to that time declared that a voluntary assignment should be void *as to creditors* if bond not filed or certain other requirements not observed) was amended so as to add the part above quoted in italics (p. 10 supra).

It will be noted that this provision could be fully carried out without resorting to any discharge and without resorting to any involuntary proceedings of any kind if provisions for discharge or for such proceedings should be suspended.

It will be noted that the discharge provisions contained in sections *128.19* Stats. 1929 et seq., were in 1897 in the statutes and were not suspended because there was then no bankruptcy act. In 1889 (Ch. 283 Laws of 1889) these discharge provisions had been enacted applicable to "any person who shall have made a voluntary assignment for benefit of creditors". In 1889 there was no Federal Bankruptcy Law.

By Chapter 334 of Laws of 1897 in addition to above amendment which prevented an assignment being void as to creditors for failure to file bond, inventory or other

defects and avoided any attempt to secure priority by garnishment (as here) after assignment, two additional sections were created:—

Sec. 1694a (Stats. 1898) (now Sec. 128.07) as follows:

> "Whenever the property of an insolvent debtor is attached or levied upon by virtue of any process in favor of a creditor, or a garnishment is made against such a debtor, such debtor may, within ten days thereafter, make an assignment of all his property and estate not exempt by law, for the equal benefit of all his creditors as provided by law, whereupon all such attachments, levies, garnishments, or other process shall be dissolved and the property attached or levied upon shall be turned over to such assignee or receiver."

It will be seen that above was a separate provision invalidating garnishments within 10 days *prior* to an assignment. This section is in no way made dependent on any discharge provision in any subsequent section, is in no way dependent on any provision for an involuntary proceeding against an insolvent and while made a part of the regulations as to voluntary assignments is a separable part because it deals with garnishment prior to the time of the assignment.

In addition, the same Chapter 334 of Laws of 1897 created a separate section providing for involuntary proceedings and providing for a discharge *"the same as in voluntary assignments"*. This section (now Sec. 128.08) was as follows:

> "When any debtor, being insolvent, shall confess judgment or do any act or make any conveyance whereby any one or more of his creditors shall obtain a preference over any other of his creditors, or shall omit to do any act which he might lawfully do to prevent any of his c reditors from obtaining preference over his other creditors, contrary to the intent of this act, or if he shall not, within ten days after any levy

by attachment, execution or garnishment made against him, make an assignment of all his property as provided in the next foregoing section of this act, or within such time in good faith institute proceedings to vacate the attachment, execution or garnishment, or secure a release of such levy, or defend against the said levy, *then, or within thirty days* thereafter, any two or more of his creditors holding and owning debts or claims of not less than two hundred dollars in the aggregate amount, may make a petition to the circuit court, or a judge thereof, in the county or circuit where such debtor resides, setting forth therein such matters and facts as may be pertinent, and after notice given in such manner as the court or judge may direct, to the debtor and creditors sought to be preferred, or to their attorney of record, of the time and place of hearing, the court in the term time, or a judge in vacation, shall proceed summarily upon such petition to hear the parties and receive such evidence as may be proper, and if it shall appear to the court or judge that the debtor is insolvent, or has been giving or is about to give a preference to any of his creditors over other of his creditors, or any of them, or has refused or neglected to make an assignment of his property as hereinbefore provided, the court or judge shall appoint a receiver who shall take possession of all the debtor's property, evidences of property or indebtedness, books, papers, debts, choses in action, and estates of every kind of the debtor, including property attached or levied upon or garnisheed in the manner and subject to the limitations herein provided, and of all property conveyed in violation of the provisions of this act, and have charge and control of the same, and of all debts or property garnisheed, except property exempt by law, and convert the same into money and distribute the same pro rata among the creditors having valid claims due or to become due, who shall prove their claims within such time and manner as the court or judge shall direct, and the court or judge shall order the debtor to file a correct inventory of his assets and

a list of his creditors as provided in section 1697, of the revised statutes of the state of Wisconsin for the year 1878; such receiver shall be appointed and all proceedings shall be had under the provisions of the laws of this state relating to receivers, and the court or judge may order or direct such debtor to do or refrain from doing whatsoever is necessary and proper to carry this act into effect. The provisions of this act shall not apply to any payment or satisfaction, in whole or in part, of a past due debt made in the usual course of business without any intent on the part of the creditor to evade the provisions of this act. ***The same proceedings may be taken, and with like effect, under the provisions of this section by such insolvent debtor for a discharge from his indebtedness as if said insolvent debtor had made a voluntary assignment pursuant to the provisions of Chapter 80 of the revised statutes of Wisconsin for the year 1878.''*** (Italics ours)

The above section was enacted in 1897 when there was no bankruptcy act just as the discharge features of what are now Sections 128.19 and following were enacted as to voluntary assignments in 1889 when there was no national bankruptcy act. The provisions of this section (128.08) (referring to involuntary proceedings and discharge therein) as enacted in 1897 were even more clearly separable from the preceding sections (relating exclusively to voluntary assignments) than were the discharge provisions of 1889 which obviously applied only to cases of voluntary assignments. This section 128.08 simply applied by way of analogy the provisions as to distribution and discharge in voluntary assignments to involuntary proceedings. This section (Sec. 128.08) and the two following sections are the only sections in the entire chapter (Ch. 128) which relate to involuntary proceedings. Section 128.08 is clearly separable in its subject matter. The fact that it, as well as the provisions enacted in 1889 as to discharge, were

enacted when no national bankruptcy act was in force does not show that the legislature contemplated that if a Federal law were enacted all the provisions as to voluntary assignments should fall. Previous decisions of the United States Supreme Court had indicated under the prior Bankruptcy Law that only provisions involving a discharge would be suspended and that administration of voluntary assignments and distribution under them by state courts were valid and not suspended. The legislature of 1897, the same as the legislature of 1889, had the right to assume that in the event of a Federal Bankruptcy Act all assignment features would remain but that discharge provisions would be suspended. The legislature of 1897 thus had the right to contemplate and undoubtedly did contemplate that section 128.08 could be suspended without at all disturbing the enforcement of 128.06.

And in 1899 after the enactment of the Federal Bankruptcy Law of July 1, 1898 there arose in Wisconsin a case in which it was squarely held that what is now Section 128.07 and which was created by Chap. 334, Laws of 1897 was valid and in force although the discharge provisions in Sec. 128.08 were suspended.

The case was *Binder v. McDonald,* 106 Wis. 332. In that case on August 1, 1899 the Wittenberg Veneer & Panel Co., a Wisconsin corporation made a voluntary assignment which was 3 days after an attachment. The trial court held that Section 1694a (now 128.07) (and which invalidated attachments within 10 days prior to the assignment) was invalid because as a part of Chapter 80, Statutes of 1898 (now Chapter 128) it was suspended by the Federal Bankruptcy Act. But the supreme court of the State held otherwise. The court said: (p. 340)

> "Perhaps the learned trial judge was induced to decide as he did by reason of certain expressions found in some of the decisions of this court from which it

might be inferred that the whole of ch. 80, Stats. 1898, is to be regarded as an insolvent law. *Holton v. Burton,* 78 Wis. 326; *Second Ward S. Bank v. Schranck,* 97 Wis. 258. Such was not the intention. What is thus stated in those cases must be regarded *as relating to the insolvency features of that statute.* The right to make such voluntary assignment for the benefit of creditors, when not forbidden by statute, is inherent in a corporation as well as an individual and existed independent of the insolvency features of that chapter. *Vanderpool v. Gorman,* 140 N. Y. 563; *Garden City B. & T. Co. v. Geilfuss,* 86 Wis. 612." (Italics ours)

The court further said: (p. 339)

"Here the plaintiff, under the state law, seized property of its debtor on an attachment. Four days afterwards the debtor, under the state statute, made a voluntary assignment for the benefit of its creditors. Thereupon the assignee under the statute cited moved to dissolve the attachment, and the court held that it had no power to decide the question, even in the absence of any proceedings in bankruptcy. *Although the making of the assignment was an act of bankruptcy, avoidable by proceedings in bankruptcy, yet, in our judgment, neither that assignment nor the motion to dissolve the attachment was a matter or proceeding in bankruptcy within the meaning of the federal statutes and the federal adjudications cited.*" (Italics ours)

It was squarely held in above case that the attachment should be declared void under the provisions of what is now 128.07 in spite of the fact that what is now Sec. 128.08 was enacted at the same time as Sec. 128.07 (that is in Chapter 334, Laws of 1899).

In the above case of *Binder v. McDonald,* 106 Wis. 332 at 337 the court said as to the decisions of this court:

"Pending the bankrupt act of 1867, it was held by that court that 'an assignment by an insolvent debtor

of his property to trustees for the equal and common benefit of all his creditors is not fraudulent, and, when executed six months before proceedings in bankruptcy are taken against the debtor, is not assailable by the assignee in bankruptcy subsequently appointed; and the assignee is not entitled to the possession of the property from the trustees.' *Mayer v. Hellman,* 91 U. S. 496."

Mayer v. Hellman, 91 U. S. 496 has never been overruled or questioned by this court and it was also followed in the decision of the Supreme Court of Wisconsin from which this appeal is taken. It is apparent that in *Binder v. McDonald,* 106 Wis. 332 the provisions of 128.08 insofar as covering the field of the bankruptcy law were treated as separable and suspended.

It is true that in 1921 the Wisconsin Legislature in enacting a revisor's bill, left all of the present chapter 128 out of the statutes. This is commented on at p. 11 of Appellant's brief as indicating a view that Section 128.06 should be deemed suspended. But obviously the act of the legislature was due to the individual opinion of the then revisor that (contrary to the decisions in the Supreme Court of Wisconsin and of this court) the whole chapter was suspended. The provision in question occurred in a long revisor's bill (Ch. 590 Laws of 1921) and could not have attracted any special legislative attention.

But the error was promptly corrected by the next legislature by passing a special bill (Ch. 132 Laws of 1923) providing that chapter 80 (now Ch. 128) should be restored into the statutes and printed as such.

Obviously the legislature realized that parts of the chapter were suspended. The action of the legislature must be construed as indicating that every part which could stand consistently with the National Bankruptcy Act should be in force. It cannot be assumed the legislature was ig-

norant of the decisions of the Supreme Court of Wisconsin and of this court. Accordingly this act of the legislature of 1923 strongly supports the separable character of every provision consistent with the Federal Act. Certainly the legislature did not intend the respective provisions must fall altogether as claimed by counsel for appellant here.

At page 12 of appellant's brief counsel states he has been informed by *someone* in the legislative reference library of Wisconsin that a certain assemblyman was the author of Chapter 132 of the Laws of 1923 and that *he* desired the enactment for certain purposes. Clearly such alleged information whether authentic or not is not entitled to the slightest consideration. The intent of the individual *author* of the bill is of course immaterial even if it could be ascertained according to the dubious method employed by counsel. But the apparent intent of the legislature which could only be to preserve every part of the statute which could stand is of the utmost importance.

In view of the fact that our own courts had already held Section 128.07 (which resembles and is directly connected with the subject matter of 128.06) as separable from the suspended provisions of 128.08, this court should certainly follow the Wisconsin Supreme Court in holding that Section 128.06 is in force regardless of whether 128.08 is in part or even entirely suspended. In Wisconsin the uniform practice has been to administer voluntary assignments under 128.06 and related sections and not to have proceedings under Sec. 128.08. The legislature has shown no disposition to change the result reached by the decisions of our Supreme Court or to disturb the existing practice.

In *Segnitz v. Garden City Banking & Trust Co.*, 107 Wis. 171 the assignment was made *before the Federal Bankruptcy Act of 1898 went into effect.* The question was whether the assignment was binding as to Illinois property

and Illinois creditors. It was held not and it was held that *at the time* of the assignment *the discharge features were in force* and therefore the assignment could not operate extra-territorially. The court said: (p. 176–177)

> "We are satisfied with the proposition that *when* this assignment was made *the bankrupt features* of our law *were in force* and the deed of assignment did not carry title to the personal assets of the assignor in Illinois,—at least, not as against creditors residing in that state. Such being the case, the defendant had a right, after the assignor's notes became due, to apply the money in its hands, *pro tanto*, to their satisfaction." (Italics ours)

Of course an assignment made after the discharge features of the state law were suspended by the Federal Act would stand on an entirely different footing since the assignor does not require the application of suspended parts and this is the established view of the effect of of the assignment as held in Tarnowski Case 191 Wis. 279.

In *Duryea v. Muse*, 117 Wis. 399 (1903) the court held that *the present section 128.06* was in force notwithstanding the bankruptcy act. It appeared no steps had been taken to enforce the assignment for the benefit of all creditors under the saving clause at end of Section 128.06 (see p. 402). The court held the assignment was invalid as failing to comply with 128.06 as to residence of assignee within state and bond and sustained judgment for plaintiff. This was done on the express ground that Sec. 128.06 was in force regardless of other provisions of Chapter 80 (now 128) the court saying, p. 406:

> "As briefly indicated in *Binder v. McDonald*, 106 Wis. 332 (5), 340, 82 N. W. 156, only 'the insolvency features' of ch. 80, Stats. 1898, are 'to be regarded as an insolvency law.' In that case it was held that, as there had been no proceedings in bankruptcy under the federal act, the state court had jurisdiction to deter-

> **mine a motion by the assignee under *sec. 1694a (now 128.07)* Stats. 1898, to dissolve an attachment levied within ten days prior to the making of a voluntary assignment. *As already indicated, that section did not include any of the insolvency features of ch. 80, Stats. 1898, but only related to enforcing the assignment.* So it is true that the *portion of sec. 1694,* Stats. 1898, above quoted, only relates to the execution of assignments; and hence it was not *ipso facto* suspended by the passage of the federal bankrupt law." (Italics ours)**

The "portion" of Sec. 1694 above referred to is the very saving clause here in question as a part of 128.06 and was thus clearly treated as separate from the insolvency and discharge features of 128.08.

Section 128.06 (then Sec. 1694 Stats. 1898) declares only that the assignment is valid to insure distribution equally even though certain requirements are not complied with. The legislature which imposed the requirements clearly had the power to provide they should be directory only and that the assignment executed in good faith would be effectual to secure distribution according to the statutes regardless of such defects. The assignor in making the assignment knows the statute and distribution, knows there can be no discharge and transfers his property for the distribution by his voluntary act. The assignor is in no way here attacking the assignment as involuntary. A creditor simply attacks it as void as to him and seeks in order to secure a priority to enforce a state remedy expressly denied him by the law of the state which is entitled to regulate the extent and application of that remedy.

In *Gilbert Paper Co. v. Whiting Paper Co.,* 123 Wis. 472, the court held the attempted garnishment invalid saying: (p. 478-9)

> "The rule of the above-cited void assignment for creditors cases would, of course, sustain the garnishment here, but for new legislation prohibiting such

procedure. After the decision of most of those cases the legislature enacted:

> 'No creditors shall in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of insolvency of any debtor, by attachment, garnishment or otherwise obtain priority over other creditors upon such assignment being for any reason adjudged void.' Sec. 2, ch. 334, Laws of 1897.

We can entertain no doubt that this legislation was aimed directly at the rule laid down in *Winner v. Hoyt, supra,* and following cases, that property attempted to be conveyed by a void voluntary assignment could be seized by any individual creditor by attachment or garnishment. Indeed, its words are too plain to invite or permit attempt to construe it upon that subject. We can but enforce it. We are aware that in *Duryea v. Muse,* 117 Wis. 399, 94 N. W. 365, subsequent to 1897, a garnishment was sustained against the assignee under a void voluntary assignment upon authority of the earlier cases. The court did not, in its opinion, at all discuss or consider the force of this legislation of 1897. It did not expressly deny it effect. If, however, it did so by implication, in sustaining the garnishment notwithstanding such statute existed and was called to our attention in the briefs, that implied denial must be deemed overruled."

In *Mayfield Woolen Mills v. Goodrich & Martineau Co.,* 189 Wis. 406 (1926) it was held that an execution by a judgment creditor was not valid as against property in hands of an assignee under a voluntary assignment although the voluntary assignment was practically same as here.

The court said: (p. 407)

> "From the stipulation it appears that the defendant, *Goodrich & Martineau Company,* a Wisconsin corporation, being unable to meet the financial demands

against it *although claiming to be solvent*, on September 3, 1924, made, executed, and delivered to three trustees an assignment of all of its property, real and personal, for the benefit of its creditors. The instrument did not comply with the statutes on voluntary assignments and was more in the nature of a common-law assignment. It was not, in some minor respects, non-preferential, because it authorized the trustees to liquidate and settle certain claims not exceeding $50 in amount. *It did not contemplate the general liquidation of the estate of the assignor, but, on the contrary, included a scheme whereby such estate might be administered for a period of three years under the terms and conditions of the instrument of assignment and the payment of the claims of creditors during that period.* Further, the trustees were authorized to continue the business in its ordinary course, and to accomplish this end they were invested with broad general powers. The assignment was not filed in the office of the clerk of the circuit court and the trustees were not required to furnish a bond." (Italics ours)

The court also said: (p. 408)

"Voluntary assignments did not originate pursuant to statute, but were recognized by the common law at an early period of its history. Statutes upon the subject are merely regulatory. At common law they were made both with and without preferences, and in either event they were valid. Preferences were even permitted under our own statutes at an early date. The voluntary assignment statutes as they appear in the Statutes of 1898 provide for an administration of the debtor's property for the ratable benefit of all his creditors under the direction of the court. Prior to the enactment of ch. 334 of the Laws of 1897, a failure to comply with the provisions of the statute on voluntary assignments in the respects therein indicated voided the assignment and subjected the debtor's property in the hands of the assignee to seizure on execution, or attachment, and the property in the

hands of the assignee was also subject to garnishment."

The court also said: (p. 411)

> "It has been held that 'an assignment by a debtor in no way affects the rights of his creditor to begin and prosecute to judgment a suit to recover his demand. It is immaterial whether the suit is begun before or after the assignment or whether the creditor has filed his claim with the assignee or not.' *Smith v. St. Paul German F. Ins. Co.* 56 Minn. 202, 57 N. W. 475; *Parsons v. Clark,* 59 Mich. 414, 26 N. W. 656; *Detroit Stove Works v. Osmun,* 74 Mich. 7, 41 N. W. 845."

Referring to the particular assignment in that case, the court said: (p. 412)

> "It is drafted ingeniously and presents a comprehensive scheme for the administration of the trust property. It appears to us that it creates a practical and workable trust, and we assume that its use is often resorted to by adjustment bureaus acting in the interests of creditors. The principal advantage to be derived from such an instrument is the probable retention of the business as a going concern and the maintenance as an asset of its good will; and in addition thereto it affords an opportunity for payment of claims of creditors in full."

In *Plewa v. St. Joseph's Congregation,* 153 Wis. 276 at 280 (1913) it was directly held that voluntary assignment was not void being saved by this provision in 128.06 added by Chapter 334, Laws of 1897 which was upheld.

It is thus apparent that the Wisconsin court has repeatedly and necessarily held that the provisions of Section 128.06 here in question are separable and are in force regardless of the recognized suspension of other provisions in the chapter including insolvency and discharge provi-

sions introduced by the same act of 1897 which introduced this saving clause into Sec. 128.06.

In 1913 (Ch. 270) the Bulk Sales Law was enacted (Sec. 241.18–19, Stats. 1929) making any transfer of goods, merchandise, etc., otherwise than in the ordinary course of trade conclusively fraudulent as to creditors unless certain requirements were complied with. But the statute was expressly declared not to apply to

> "or to, or by, any person to whom any such property may in good faith be transferred or assigned, in trust for the creditors of such transferor or assignor, for the purpose of liquidating the debts of the latter."

The above indicates plainly that the legislature looked with favor on such assignments and regarded the provisions as to vountary assignments and their administration as in force.

In *Hazelwood v. Olinger Building Dept. Stores, Inc.,* (Wis. 1931) 236 N. W. 591 it was held that Wisconsin statutes 286.10–11 providing for distribution of assets of insolvent corporation against whom execution has been returned unsatisfied and providing for no discharge, was not superseded by the Bankruptcy Act. The court said: (p. 592)

> "Plaintiff has capacity to sue if he has title to the property in question. The appealing defendants predicate their position upon *International Shoe Co. v. Pinkus,* 278 U. S. 261, 49 S. Ct. 108, 73 L. Ed. 318. This case no doubt came as a surprise to a good many lawyers. While it had everywhere been freely conceded that the Bankruptcy Act was paramount to the insolvency laws of the state, it had been generally thought, since the decision of *Boese v. King,* 108 U. S. 379, 2 S. Ct. 765, 27 L. Ed. 760, that a state assignee took title and might proceed until his authority was superseded by the invocation of the provisions of the federal Bankruptcy Act. It is held, however, in *In-*

ternational Shoe Co. v. Pinkus, that, where the property is impounded under a state law which provides not only for its pro rata distribution among the creditors as far as it will go but all claims filed are subject to be discharged upon the application of the bankrupt, the state law is entirely superseded, and that an assignee under the state law taking under such a statute takes no title as such.

In response to the argument made by counsel for appellants, it should be said that there is a fundamental distinction between the law of Arkansas as stated in the opinion of the court in *International Shoe Co. v. Pinkus* and the law of this state. In the matter of *Voluntary Assignment of Tranowski,* 191 Wis. 279, 210 N. W. 836, 49 A. L. R. 686, it was held that the right to make a voluntary assignment for the benefit of creditors is a personal right inherent in the ownership of property, and existed at common law independent of the statute; that, while the discharge of a bankrupt from his debts constitutes the very essence of the Bankruptcy Law, the discharge of a debtor is no part of an assignment law, that part of the chapter relating to discharge is entirely superseded by the federal act, and has, under present conditions, no efficacy; and, further, that a creditor filing his claim and accepting his pro rata share of the proceeds under a voluntary assignment does not waive his right to object to the debtor's discharge. As a condition of filing a claim under the Arkansas statute, the creditor was required to agree that payment of a pro rata share of the assets of the insolvent's estate should discharge his claim. It is hardly necessary to point out the wide difference between the statute of Arkansas and that of Wisconsin as construed by this court. Upon the general question what state laws are superseded by the Bankruptcy Act, see *Stellwagen v. Clum,* 245 U. S. 605, 38 S. Ct. 215, 62 L. Ed. 507, *Old Town Bank of Baltimore v. McCormick,* 96 Md. 341, 53 A. 934, 60 L. R. A. 577, 94 Am. St. Rep. 577; *Pelton v. Sheridan,* 74 Or. 176, 144 P. 410; *Mayer v. Hellman,* 91 U. S. 496, 23 L. Ed. 377.

> **Even if this were not true, still the contention of the appellants must fall in this case. The plaintiff, Hazelwood, was appointed as receiver of an insolvent corporation. This is a power inherent in equity courts, and does not depend for its vitality upon any provision of the statute. The procedure in cases of this kind is regulated by sections 286.10 and 286.11. These sections, however, do not create the remedy. It cannot be contended that the enactment of the federal Bankruptcy Act suspended the power of courts of equity in the several states. No provision is made anywhere for the discharge of an insolvent in proceedings of the kind instituted in this case. So that, in any event, the plaintiff might properly have maintained this action."**

The case of International Shoe Co. v. Pinkus, 278 U. S. 261 considered.

The above decision held only that an individual creditor who could not and did not invoke bankruptcy proceedings could not be coerced by a state law into consenting to a discharge as a condition of sharing in assets conveyed by a voluntary assignment. The present case is just the opposite. Even in that case the decision was reached by a majority with Justices McReynolds, Brandeis and Sanford dissenting. That the view of the majority was controlled by the inseparable discharge feature and was limited to that appears from the entire decision. We particularly call attention to the following excerpts:

At p. 264 this court pointed out that the Arkansas Supreme Court had construed the statute as an insolvency law.

At p. 264 the court particularly comments on the provision of the Arkansas law as applied by the state court whereby the creditor must consent to discharge in order to participate and the court then cites *Mayer v. Hellman,* 91 U. S. 496 and other cases including the Wisconsin deci-

sion in *Segnitz v. Garden City etc. Co.*, 107 Wis. 171 which cases make the very distinction as to discharge relied on by Wisconsin Supreme Court in the present case.

At page 265 this court said:

> "Congress did not intend to give insolvent debtors *seeking discharge,* or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws." (Italics ours)

In present case the assignor has never asked for discharge and obviously cannot get it under Wisconsin law.

And at p. 266 the court said:

> "But the property was not handed over simply for the purpose of the payment of debts *as far as it would go;* it was transferred pursuant to a *statute and decree imposing conditions intended to secure the debtor's discharge.* As its claim was less than $500, plaintiff in error could not invoke the jurisdiction of the bankruptcy court without cooperation of other creditors. It was shown by insolvent's petition that his property was less than one-third of his debts. The amount remaining after deducting his exemption and the costs was not sufficient to pay 20 per cent of the claims. All creditors except plaintiff in error agreed fully to release insolvent in consideration of the distribution directed by the decree. And, as their claims were much in excess of the fund, *plaintiff in error could have obtained nothing on account of its claim without giving insolvent a full release.*" (Italics ours)

And at page 268 the court stated:

> "And, as the passage of the Bankruptcy Act superceded the state law, at least in so far as it relates to the distribution of property and *releases to be given,* plaintiff in error is entitled to have its judgment paid out of the fund in the hands of the receiver." (Italics ours)

We respectfully submit that there is nothing in above case which questions the correctness of the judgment here under review. On the contrary the whole decision supports the validity and enforceability of a separable and by the state court separated provision of law relating to the execution and effect of voluntary assignments. We respectfully submit that neither the statutory provision nor the judgment here involves any encroachment by the State of Wisconsin into a field occupied by the Federal Congress but on the contrary occupies only a field which constitutes a recognized, valuable and appropriate field for state authority.

Respectfully submitted,

STATE OF WISCONSIN,
as Amicus Curiae,

By JOHN W. REYNOLDS,
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of Madison, Wisconsin,
Special Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 171.—October Term, 1932.

Mrs. J. H. Pobreslo, Appellant, vs. Joseph M. Boyd Company, et al. } Appeal from the Supreme Court of the State of Wisconsin.

[January 9, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

Chapter 128 of the Wisconsin Statutes, 1929, regulates and controls voluntary assignments for the benefit of creditors and also contains provisions relating to the discharge of insolvent debtors. By this appeal we are called on to decide whether as construed below the provisions of that chapter which relate to voluntary assignments for the benefit of creditors and especially a clause contained in § 128.06 conflict with the National Bankruptcy Act. The clause declares: "No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of the insolvency of any debtor, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void".*

*Section 128.06 follows.

"All voluntary assignments or transfers whatever . . . for the benefit of or in trust for creditors shall be void as against the creditors of the person making the same unless the assignee shall be a resident of this state and shall, before taking possession of the property assigned and before taking upon himself any trust conferred upon him by the instrument of assignment, deliver to the county judge or court commissioner of the county in which such assignor or some one of the assignors at the time of the execution of such assignment shall reside . . . a bond . . . in a sum not less than the present value of the assets of such assignor, . . . with two or more sufficient sureties . . . ; and the bond shall be conditioned that such assignee shall faithfully discharge the several trusts reposed in him by such assignment and diligently and faithfully collect and reduce to money the property assigned to him and account for and pay over to the several parties,

The Boyd Company, a Wisconsin corporation, March 23, 1931, made a voluntary assignment of all its property to assignees for the benefit of its creditors. They immediately took possession, and the circuit court of Dane county on the same day assumed jurisdiction declaring in its order that it did so pursuant to c. 128. Appellant, a non-assenting creditor, brought suit against the assignor and prayed judgment for more than $2,500. September 1, 1931, she instituted garnishment proceedings against the assignees, asserting that the assignment was void because of failure to comply with c. 128 in several particulars and because that chapter was repugnant to the Bankruptcy Act. Thereafter the assignor amended the assignment to authorize the judge of the circuit court, in case of resignation of the assignees, to appoint a trustee. The assignees resigned, and the court appointed appellee Samp as sole trustee. He answered the garnishment and admitted that he had the property conveyed by the assignment but denied that he had possession or control of any property in which the assignor had an interest. Appellant, having recovered judgment against the assignor for $2,645, moved for judgment against the garnishees. The court found that the assignees had received property belonging to the assignor in excess of appellant's judgment and had transferred the same to the trustee, and ordered that it

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then being creditors of the assignor, all moneys that shall come into his hands from the effects of such assignor after deducting the necessary expenses of performing the several trusts mentioned in the assignment, as settled and allowed by the circuit court, and abide the order of said court. But no assignment shall be void because of any defect, informality or mistake therein or in the bond, inventory or list of creditors accompanying the same; and the court or judge may direct the amendment of the assignment or of any other such paper to effect the intention of the assignor or assignee, and any such amendment shall relate back to the time of the execution of the paper to which it is made. No mistake in filing a copy instead of an original or any like mistake or inadvertent failure to comply with the provisions of this chapter shall avoid the assignment. No creditor shall, in any case where a debtor has made or attempted to make an assignment for the benefit of creditors, or in case of the insolvency of any debtor, by attachment, garnishment or otherwise, obtain priority over other creditors upon such assignment being for any reason adjudged void, or in consequence of any sale, lien or security being adjudged void; but in all such cases the property of such insolvent debtor shall be administered for the ratable benefit of all his creditors under the direction of the court by the assignee or by any receiver of said property and estate appointed as hereinafter provided."

be applied to satisfy the judgment. The supreme court reversed and directed that the garnishee action be dismissed. — Wis. —.

In view of the construction theretofore put upon c. 128 by the state supreme court, it is evident that the assignment did not have the effect of instituting proceedings contemplating discharge of assignor from its debts.

In *Voluntary Assignment of Tarnowski* (1926), 191 Wis. 278, the supreme court declared that, as to all matters comprehended within the Bankruptcy Act, the state insolvency laws had been by it completely superseded and said (p. 283): "The statutes of this state relating to the subject of bankruptcy are suspended during the existence of the federal Bankruptcy Act, and . . . such statutes afford the courts of this state no power or authority to discharge debtors from their debts." In *Hazelwood* v. *Olinger Building Department Stores* (1931), — Wis. —, the court pointed out that the Wisconsin statute under consideration is essentially different from the Arkansas statute before us in *International Shoe Co.* v. *Pinkus,* 278 U. S. 261, and, speaking through Chief Justice Rosenberry, said (p. —): "In the matter of *Voluntary Assignment of Tarnowski* . . . it was held that the right to make a voluntary assignment for the benefit of creditors is a personal right inherent in the ownership of property, and existed at common law independent of the statute; that, while the discharge of a bankrupt from his debts constitutes the very essence of the Bankruptcy Law, the discharge of a debtor is no part of an assignment law; that part of the chapter relating to discharge is entirely superseded by the federal act, and has, under present conditions, no efficacy; and, further, that a creditor filing his claim and accepting his pro rata share of the proceeds under a voluntary assignment does not waive his right to object to the debtor's discharge. As a condition of filing a claim under the Arkansas statute, the creditor was required to agree that payment of a pro rata share of the assets of the insolvent's estate should discharge his claim. It is hardly necessary to point out the wide difference between the statute of Arkansas and that of Wisconsin as construed by this court." In the case at bar the court again declared that the provisions in c. 128 that apply to such voluntary assignments are severable from those that relate to the discharge of insolvent debtors. It reiterated that the federal Act superseded the latter.

And it held that, as there was an attempt to make an assignment for the benefit of creditors, the quoted clause of § 128.06 prevented garnishment, even though the assignees had failed to follow some of the procedural details prescribed by c. 128.

There is slight need to refer more specifically to the differences between this case and *International Shoe Company* v. *Pinkus, supra.* There the proceedings in the chancery court were under the state insolvency law (Crawford & Moses' Dig., §§ 5885-5893) and not under the law governing voluntary assignments for the benefit of creditors. *Id.*, §§ 486-493. Upon the entry of the shoe company's judgment against him, Pinkus sought discharge from his debts under the insolvency law and to that end procured the entry of a decree under which his creditors were prohibited from having any payment out of his property except upon stipulation for his full release. As shown by our decision in that case, the Arkansas insolvency law not only related to the subject of bankruptcies but actually dealt with essential features of that subject which are covered by the Act now in force. It not only governed discharge of the bankrupt debtor but imposed conditions which trammeled and made against equal distribution of his property.

In the case now before us the Wisconsin statutory provisions relating to discharge of insolvent debtors were not invoked. There is nothing in the assignment, the application to the circuit court to take jurisdiction or its order thereon to suggest that the discharge of the assignor was contemplated. The provisions regulating the administration of trusts created by voluntary assignments for the benefit of creditors apply whether the assignor is solvent or insolvent. They do not prevent creditors from bringing action against the debtor or require those seeking to participate in the distribution of the estate to stipulate for his discharge. And, quite in harmony with the purposes of the federal Act, the provisions of c. 128 that are regulatory of such voluntary assignments serve to protect creditors against each other and go to assure equality of distribution unaffected by any requirement or condition in respect of discharge.

A proceeding under the Arkansas law derives its force solely from legislation that involves a judicial winding up of an insolvent estate and the discharge of the debtor. Such a law is within the

field of the federal Act. Indeed, the declaration: "Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it" (30 Stat. 566) suggests that Congress intended to supersede these local enactments. See *In re Sievers*, 91 Fed. 366. *Johnson* v. *Star* (Tex. Civ. App.) 44 S. W. (2d) 429. On the other hand the Wisconsin law merely governs the administration of trusts created by deeds like that in question which do not differ substantially from those arising under common law assignments for the benefit of creditors. The substantive rights under such assignments depend upon contract; the legislation merely governs the execution of the trusts on which the property is conveyed. And as proceedings under any such assignment may be terminated upon petition of creditors filed within the time and in the manner prescribed by the federal Act (*West Company* v. *Lea*, 174 U. S. 590), it is apparent that Congress intended that such voluntary assignments, unless so put aside, should be regarded as not inconsistent with the purposes of the federal Act. *Mayer* v. *Hellman*, 91 U. S. 496, 501. *Boese* v. *King*, 108 U. S. 379, 385-387. *Stellwagen* v. *Clum*, 245 U. S. 605, 615. *Straton* v. *New*, 283 U. S. 318, 327. It follows that the above quoted provision of § 128.06 is valid and effective to prevent garnishment of funds in the hands of the trustee.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.